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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 284

LOUIS BERNARD LAPIDES,

Petitioner,

v.

TOM C. CLARK, ATTORNEY GENERAL, AND WATSON B. MILLER, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT.

The Petitioner, by his attorneys, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit (R. 13) affirming an order of the United States District Court for the District of Columbia (R. 7) dismissing the complaint and denying petitioner's motion for summary judgment.

Jurisdiction

The judgment of the Court of Appeals was entered on May 23, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether petitioner may be deprived of his citizenship acquired in 1928 by naturalization on the basis of a statute (54 Stat. 1170, 8 U. S. C. 804) enacted in 1940 which discriminates between native born and naturalized citizens by providing for the loss of citizenship solely on the part of certain naturalized citizens by residence abroad.

2. Whether the aforesaid statute (The Nationality Act of 1940) arbitrarily discriminates between native born and naturalized citizens and between naturalized citizens themselves in violation of the Fifth Amendment.

3. Whether petitioner can be expatriated by residence abroad during wartime when war and shipping conditions prevented his return or whether war and factors beyond his control toll the statute.

4. Whether petitioner has been deprived of his citizenship in violation of the Fifth Amendment.

Constitutional and Statutory Provisions Involved

Article I, Section 8, Clause 4

"The Congress shall have power . . . to establish a uniform rule of naturalization.

Article II, Section 1, Clause 5

"No person except a natural born citizen . . . shall be eligible to the office of President."

Fifth Amendment

"No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

Section 404 of the Nationality Act of 1940 (54 Stat. 1170, 8 U. S. C. A. 804) [1] provides:

> "A person who has become a national by naturalization shall lose his nationality by:
>
> (a) Residing for at least two years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, if he acquires through such residence the nationality of such foreign state by operation of the law thereof; or
>
> (b) Residing continuously for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in Section 406 hereof.
>
> (c) Residing continuously for five years in any other foreign state, except as provided in section 406 hereof."

Certain exceptions are recognized by Sections 405 and 406 of the Nationality Act of 1940, which provide as follows:

> "*Section 405.* Section 404 shall have no application to a person:
>
> (a) Who resides abroad in the employment and under the orders of the Government of the United States;
>
> (b) Who is receiving compensation from the Government of the United States and residing abroad on account of disability incurred in its service.

---

[1] By the terms of Section 409 of the Nationality Act of 1940 as amended (59 Stat. 544) the effective date of loss of citizenship under Section 404 of the Act was postponed until October 14, 1946. The effective date was originally one year from the date of the approval of the Act (54 Stat. 1171). It was extended on October 16, 1941 (55 Stat. 743), on October 9, 1942 (56 Stat. 779), on September 27, 1944 (58 Stat. 747), and finally on October 11, 1945 (59 Stat. 544), so that the Section 404 became effective six years from the date of approval of the Act. Thus although under 404(a) and (b) longer extensions were granted, under 404(c) the extension amounted only to one year.

Section 406. Subsections (b) and (c) of section 404 shall have no application to a person:

(a) Who shall have resided in the United States not less than twenty-five years subsequent to his naturalization and shall have attained the age of sixty-five years when the foreign residence is established.

(b) Who is residing abroad upon the date of the approval of this Act, or who is thereafter sent abroad, and resides abroad temporarily solely or principally to represent a bona fide American educational, scientific, philanthropic, religious, commercial, financial, or business organization, having its principal office or place of business in the United States, or an international agency of an official character in which the United States participates, for which he receives a substantial compensation;

(c) Who is residing abroad on account of ill health;

(d) Who is residing abroad for the purpose of pursuing studies of a specialized character or attending an institution of learning of a grade above that of a preparatory school, provided that such residence does not exceed five years;

(e) Who is the wife, husband, or child under twenty-one years of age of, and is residing abroad for the purpose of being with, an American citizen spouse or parent who is residing abroad for one of the objects or causes specified in section 405 or subsections (a), (b), (c), or (d) hereof;

(f) Who was born in the United States or one of its outlying possessions, who originally had American nationality, and who, after having lost such nationality through marriage to an alien, reacquired it.

(g) Who is the wife, husband, or child under twenty-one years of age of, and is residing abroad for the purpose of being with a spouse or parent who is an American national by birth and such spouse or parent during minority for a period or periods totaling ten years has resided in the United States.

(h) Who is a veteran of the Spanish-American War, or of the World War, his wife, minor children, or dependent parents."

Public Law 776-80th Congress.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Organic Act of Puerto Rico (39 Stat. 951) is amended by inserting the following new section:

'*Section 5b.* Section 404(c) of the Nationality Act of 1940 (U. S. C., title 8, sec. 804(c)), shall not be applicable to persons who acquired citizenship under the provisions of sections 5 and 5a of this Act.' This amendment to be retroactive to October 13, 1945.

Approved June 25, 1948."

Statement

In his complaint (R. 1) petitioner alleges that he was born in Austria, that he entered the United States in 1922 and was naturalized as a citizen of the United States on June 27, 1928. Except for three temporary absences appellant resided in the United States until 1934. From 1934 until 1947 appellant remained in Palestine. On July 3, 1947 petitioner arrived in the United States and on July 8, 1947 he was excluded on the ground that he had expatriated himself by reason of residence abroad of more than five years under Section 404 of the Nationality Act of 1940 as amended (8 U. S. C. A. 804, 809; 54 Stat. 1170, 1171), and on the further grounds that he had become an alien and was not in possession of a valid visa.

Petitioner alleges that the statutory limitation restricting residence abroad to five years on penalty of loss of citizenship was enacted subsequent to his naturalization, that it has been interpreted to apply retroactively and that

native born citizens are not subject to the same statutory limitation. He also alleges that he was not obliged to return to the United States on or before October 14, 1946 in order to retain his citizenship (R. 4).

The complaint further sets forth that on August 15, 1947 appellant applied for a writ of habeas corpus in the Southern District of New York which alleged that the Immigration Service had no authority to detain him pending a judicial determination of his right to enter as a citizen. On February 6, 1948 the Circuit Court of Appeals for the Second Circuit denied this writ without deciding "what effect if any such denial had upon the plaintiff's right to sue under 54 Stat. 1171, 8 U. S. C. A. 903".[2]

Petitioner in the present action seeks a judgment declaring that he is a citizen, that Section 404(c) of the Nationality Act is inapplicable to him and that said Section is unconstitutional.

Opinion Below

The Court of Appeals affirmed the order of the District Court with one judge dissenting (R. 8-12). The opinion is not yet reported. The majority opinion accounted for the discrimination against naturalized citizens on the ground that it was necessary "to lessen friction with foreign governments growing out of disputes as to the nationality of our naturalized citizens." It relied upon *Mackenzie* v. *Hare*, 239 U. S. 299 (1915) where expatriation resulted on the part of a woman by marriage to an alien and concluded that "In view of this decision, supporting classification as between native born citizens, we cannot doubt that for a simi-

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[2] *U. S. ex rel. Lapides v. Watkins*, 165 F. (2d) 397 (C. C. A. 2d 1948). This opinion was annexed to appellant's motion for summary judgment. It is clear that this prior habeas corpus action is not res judicata on the issues raised herein. *Wong Doo v. United States*, 265 U. S. 293 (1924), *Collins v. Loisel*, 262 U. S. 425 (1923). In any event, as note[2] in the dissenting opinion below, res judicata was neither urged nor pleaded by the government.

lar purpose Congress has the power to distinguish between native born and naturalized citizens." The majority found that petitioner "reveals no arbitrary application of the statute as to him" in view of his failure to return within the permitted time.

The dissenting judge was of the opinion that the statute was unconstitutional on two grounds—because of the discrimination against naturalized citizens and because it arbitrarily expatriated petitioner. He concluded that the Constitution did not authorize Congress "to deprive citizens either at or after naturalization of liberties that other citizens enjoy . . . Together with the immigration law the Nationality Act makes it in effect a crime punishable by banishment, which may well be called cruel and unusual for some citizens but not for others to live five years abroad. Even complete inability, from whatever cause, to return to the United States during the five year period gives no immunity and a considerable number of foreign born Americans have therefore been banished by circumstances over which they had no control."

Reasons for Granting the Writ

1. This case for the first time squarely raises the important question of federal law whether Congress may enact legislation discriminating between native born and naturalized citizens. The outcome of this litigation will directly affect the American citizenship of several thousand persons stranded abroad during World War II. It will define the rights of some six and a half million naturalized citizens. The Supreme Court has repeatedly asserted that except with regard to the presidency, naturalized citizens and native born stand on the same footing. These assertions are supported by a reading of the Constitution in the light of legal concepts and principles prevailing at the time of its adoption. The majority opinion below is in direct conflict

with the Constitution and with these repeated Supreme Court expressions.

2. The penalty of expatriation by five years residence abroad does not apply to native-born Americans. It likewise does not apply to certain naturalized citizens including those over 65 who resided in the United States for twenty-five years, those representing American educational or business firms, veterans of World War I and the Spanish American War, those born in Puerto Rico and others (8 U. S. C. 805, 806). This distinction between naturalized citizens was not considered by the court below and cannot be justified "by a policy to avoid embarrassment and controversy with foreign governments." Such policy would apply to all naturalized citizens and to native born Americans of dual nationality. The distinction cannot be supported nor can the reasoning of the court below justify the differentiation between native born and naturalized citizens on the one hand and between classes of naturalized citizens on the other. It is the contention of petitioner that the classifications made by the Act are arbitrary and unconstitutional.

3. The petitioner alleges that he was not required to return to the United States on October 14, 1946 as required by the Act. (Par. 20 of the complaint, R. 4). Under this allegation he should have been permitted to establish and the court could have taken judicial notice of the fact that from 1941 to 1946 he was unable to return because of the war and lack of shipping conditions. Administratively, the government has determined that such factors do not toll the statute. Deprivation of citizenship under such an interpretation results in involuntary expatriation and is arbitrary and unconstitutional.

ARGUMENT

POINT I

There can be no valid classification between naturalized and native born citizens except those recognized by the Constitution.

The issue presented by the complaint is whether Congress can under the Constitution provide a ground for expatriation which applies only to naturalized citizens.

1. The Supreme Court has on several occasions stated that except with regard to the Presidency, a naturalized citizen stands on equal footing with a native born.

> "A naturalized citizen is, indeed, made a citizen under an act of congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. *The constitution does not authorize congress to enlarge or abridge those rights. The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up,* and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue. *He is distinguishable in nothing from a native citizen, except so far as the constitution makes the distinction. The law makes none.*" (Italics supplied). *Chief Justice Marshall* in *Osborn* v. *United States Bank*, 22 U. S. 738, 827 (1824).

> "The distinction between citizenship by birth and citizenship by naturalization is clearly marked in the provisions of the Constitution, by which 'no person, except a natural born citizen, or a citizen of the United States at the time of the Adoption of this Con-

stitution, shall be eligible to the office of President'; and 'the Congress shall have power to establish an uniform rule of naturalization.' Constitution, Art. 2, Sect. 1; Art. 1, Sect. 8." *Justice Gray* in *Elk v. Wilkins*, 112 U. S. 94, 101 (1884).

"Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency. Minor *v.* Happersett, 21 Wall 162, 165; Elk *v.* Wilkins, 112 U. S. 94, 101; Osborne *v.* Bank, 9 Wheat 738, 827." *Justice Van Devanter* in *Luria v. United States*, 231 U. S. 9, 22 (1913).

" 'Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects save that of eligibility to the Presidency.' Luria *v.* United States, 231 U. S. 9, 22." *Justice Frankfurter* in *Baumgartner v. United States*, 322 U. S. 665, 673 (1944).

"It may be doubted that the framers of the Constitution intended to create two classes of citizens, one free and independent, one haltered with a lifetime string tied to its status." *Justice Rutledge*, concurring, *Schneiderman v. United States*, 320 U. S. 118, 167 (1943).

See also: *Konvitz, The Alien and the Asiatic in American Law* (1946) Chapter 4, The Right To Remain a Citizen.

2. Under English law, naturalization conferred all the rights of the native born upon an alien except eligibility for certain public offices.

Coke on Littleton, fols. 8a, 129a;

Blackstone, *Commentaries*, Book I, ch. 10;

Regina v. *Manning*, 2 Car. & K. 891, 175 Eng. Rep. 372, 378 (Ex. Ch. 1849);

Collingswood v. *Pace*, 1 Vent 413, 420, 429, 86 Eng. Rep. 262, 266-267, 272 (Ex. Ch. 1664).

The Constitution should be interpreted with this background, *Ex parte Grossman*, 267 U. S. 87, 108-109 (1925), as well as in the light of contemporaneous construction. Naturalization was considered vital to the success of our country in its early days as a means of encouraging immigration and an unequal status by naturalized citizens was deemed to discourage immigration. See *Tsiang, The Question of Expatriation in America prior to 1907* (1942) at pp. 18-24. In our foreign relations from the War of 1812 and for almost one hundred years thereafter we consistently asserted the equality of native born and naturalized citizens in our foreign relations.

> "It is impossible for the United States to discriminate between their native and naturalized citizens . . ." (Monroe to Foster, British Minister at Washington, May 30, 1812) III American State Papers on Foreign Relations 454.
>
> "By our law, all the rights of natives are given to naturalized citizens" (President Madison to Binns, February 11, 1813; II Letters and Other Writings of James Madison 558).
>
> ". . . When the process of naturalization is once performed in the United States, the rights of the adopted citizen, so far as foreign nations are concerned, are deemed and held to be everywhere, on the ocean and on the land, the same as those of a native-born citizen." (Clay to Gallatin, June 19, 1826, Department of State, M.S., "Instructions, Great Britain," National Archives XI, 94-95).
>
> "Our obligation to protect both these classes (naturalized and native Americans) is in all respects equal. We can recognize no difference between the one and the other, nor can we permit this to be done by any foreign government, without protesting and remonstrating against it in the strongest terms." (Secretary of State Buchanan to Bancroft, December 18, 1848, State Papers XLVII, 1241-1243).

"The moment a foreigner becomes naturalized, his allegiance to his native country is severed forever . . . Should he return to his native country, he returns as an American citizen, and in no other character." (Cass to Wright, July 8, 1859, State Papers LII, 1331 Ex. Doc. 38, 36 Cong. 1st Sess. 132).

"Our Government is bound to protect the rights of our naturalized citizens everywhere to the same extent as though they had drawn their first breath in this country. We can recognize no distinction between our native and naturalized citizens." (President Buchanan, Annual Message of December 3, 1860; V Richardson's Messages 641.)

"All naturalized citizens of the United States, while in foreign countries, are entitled to and shall receive from this government the same protection of persons and property which is accorded to native born citizens." Law of July 28, 1868 (Sec. 2000, Rev. Stat.).

"A native and naturalized American . . . may go forth with equal security over every sea and through every land under heaven including the country in which the latter was born. They are both American citizens and their exclusive allegiance is due to the Government of the United States." 9 Op. Atty Gen. 360 (1858).

"When an alien . . . is found to be of good moral character, he is admitted to such citizenship; and is thenceforth clothed and invested with the same rights and privileges that pertain to native citizens of the country, and entitled to the same degree of protection, whether abroad or at home." Secretary of State Frelinghuysen to Mr. Cramer, July 28, 1883, III Moore's International Law Digest 583-4.

"Mere residence abroad is not, however, construed as an abandonment of allegiance." Secretary of State Bayard to Col. Frey, May 20, 1887, III Moore's International Law Digest 584.

"Our statutes do not allow this government to admit any distinction between the treatment of native and naturalized Americans abroad. . . ." Pres. McKinley, Annual Message, For. Rel. 1899, XXXI; III Moore's International Law Digest 586.

3. The framers of the Constitution rejected a draft to empower Congress to regulate naturalization, which Madison pointed out would have given Congress the power to legislate respecting the enjoyment by the naturalized of the various privileges of citizenship. 2 *Farrand,* Records of the Federal Convention of 1787, 144, 167, 235; 4 *Farrand,* 45. Thus the narrow statement of power ultimately incorporated in the Constitution and the specification therein of a distinction between naturalized and native-born with respect to the Presidency, reflect a deliberate determination not to leave to Congress the power to regulate the status, rights and privileges of the naturalized. (See: *Hanover National Bank* v. *Moyses,* 186 U. S. 181, 187.)

The majority below was concerned with lessening friction with foreign governments growing out of disputes as to the nationality of our naturalized citizens. It was upon such disputes that our republic was established. The only way to avoid them is to eliminate naturalization. Moreover, it will be noted that not a single reference by the majority indicates that we had any friction with foreign governments other than those claiming allegiance from the naturalized citizen, *i.e.,* his country of origin. Petitioner did not return to his native land but went to a third country.

If Section 404(c) of the Nationality Act of 1940 is sustained, then Congress (apart from the Constitution) may create classes of American citizenship; one class which will be free and untrammeled and another class restricted in its right to travel and remain abroad. If this power is upheld, then Congress may create a second class citizenship. A naturalized citizen "is distinguishable in nothing from a

native born citizen, except so far as the Constitution makes the distinction." Chief Justice Marshall in *Osborn* v. *United States Bank, supra.* The Constitution permits a distinction only with regard to the presidency. Congress, therefore, has no constitutional power to make the classification created by Section 404(c) of the Nationality Act of 1940.

Point II

Assuming arguendo that there may be a classification between citizens, the classification is arbitrary and unconstitutional.

(A) History of 404 (c) of Nationality Act of 1940.

(1) *Prior to 1907.* Mere residence abroad by a naturalized citizen did not result in expatriation or in any presumption of loss of diplomatic protection. 14 *Op. Attorney General 295; Tsiang, The Question of Expatriation in America prior to 1907* (Johns Hopkins University Studies—1942, pp. 102-103).

(2) *Between 1907 and 1941.* The prevailing view under the 1907 Expatriation Act was that residence abroad by a naturalized citizen resulted in a *presumption* of loss of diplomatic protection—not loss of citizenship.[3]

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[3] In the administrative proceedings herein no claim was made of loss of citizenship under the 1907 Act. See *U. S. ex rel. Lapides v. Watkins, supra,* and paragraph 8 of complaint (R. 2). This issue was raised in the District Court for the first time. It is submitted that the government may not raise the issue in the light of its failure to do so administratively. *Ex parte Woo Wah Ning,* 67 F. Supp. 56, (D. C. Wash. 1946). Under Section 5 of the Administrative Procedure Act, (60 Stat. 238; 5 U. S. C. A. 1005) appellant was entitled to timely notice of the issues of law and fact in his exclusion proceeding. 56 Yale Law Journal 700, 701 (1947).

In *Tsiang, The Question of Expatriation in America Prior to 1907* (p. 108), it is stated, with reference to the 1907 presumption that its

> "net effect was simply the withdrawal by the State Department of American protection."

This prevailing view is expressed in the President's message on the "Codification of the Nationality Laws of the United States" (76th Cong. 1st Session). In Part I, page 70, it is stated that the 1907 Act [4]:

> ". . . as construed by the courts, the presumption of loss of citizenship arising under its terms never becomes final, regardless of the length and cause of the foreign residence (Nurge v. Miller, 286 Fed. 982; Miller v. Sinjen, 289 Fed. 388; United States v. Eliasen, 11 F. (2d) 785; Camardo v. Tillinghast, 29 F. (2d) 527). In these cases the courts adopted the view which had been expressed by Attorney General Wickersham in an opinion of December 1, 1910 (28 Op. Atty. Gen. 504), that *the presumption relates to loss of the right of diplomatic protection as a citizen, rather than loss of citizenship itself.*" (Italics supplied.)
>
> See also *Camardo v. Tillinghast,* 29 F. (2d) 527 (C. C. A. 1, 1928);
>
> *Haaland v. Attorney General,* 42 F. Supp. 13, 20 (D. Md. 1941).

This view is that expressed by the Department of State.

3 *Hackworth Digest of International Law* 294 et seq. (1942);

See also: Hearings on H. R. 6127, 9980 (76th Cong. 1st Sess.) p. 136.

Thus there was no provision for loss of citizenship by reason of foreign residence at the time the plaintiff departed from the United States in 1934.

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[4] Reprinted at page 494 of the Hearings on H. R. 6127 and H. R. 9980, 76th Congress, 1st Sess.

The Codifiers who proposed the Nationality Act of 1940 merely suggested that there was a basis for providing that residence by a naturalized citizen *in his country of origin* should result in expatriation. It was recognized that such provision would be "somewhat drastic." They stated (President's Message, *supra*, Part I, p. 71, 75):

> "While the provision of subsection (b) for loss of nationality in cases of naturalized citizens who reside for three years in their countries of origin may appear to be somewhat drastic, it is believed to be fully warranted. . . . As to the second question, it was concluded that the provisions of subsection (b) should be limited to cover naturalized citizens residing in their countries of origin. Needless to say, naturalized citizens who resume residence in foreign lands from which they came are apt to renew old associations and ways of living and thinking and thus become merged in the native population, losing to a degree, if not completely, their American character and feeling. . . . It is believed that cases of naturalized citizens residing in foreign countries other than those from which they came may be disposed of under the provisions of Section 337(c) of the code. . . ."[5]

During the hearings on the Nationality Act, the provisions of Section 404(c) were first suggested. The hearings on H. R. 6127, 9980 (76th Cong. 1st Sess.) pp. 140-141, sets forth the following:

> "MR. REES. In other words, you have done away with the presumption only in cases where a man goes back to his own country?
>
> MR. FLOURNOY. Under this expatriation provision, you mean?
>
> MR. REES. Yes.

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[5] 337(c) proposed a presumption of fraud in acquiring naturalization where a person became a permanent resident abroad within ten years of naturalization.

MR. FLOURNOY. It is a serious question, and I think the committee and the subcommittee ought to consider whether it would be desirable to put in a provision to cover each person who goes to a third country. The principal cases we have, I may say, are these Zionists. They are principally Russian and German Jews who were naturalized in this country and later went to Palestine. We have other cases, but I mean that there are more of that particular body than in any other category. We have other cases, for instance some German in this country who has gone maybe to South Africa or to one place and another, and perhaps it would be desirable to have in the code a provision for termination of nationality in those cases. I think the thing is worthy of consideration. Maybe some of the representatives of the other departments here would want to express views on this."

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"MR. REES. We will change it and use 7 years and 10 years.

"MR. FLOURNOY. The cases which cause trouble are the cases where a person settles down in some country. We might say a residence of 7 years would result in a loss of citizenship unless he came under one of these exceptions. Personally, I think it would be reasonable. I do not know why a person who obtained naturalization upon a statement under oath that he intends to reside permanently in the United States should retain his citizenship if he goes and lives for some long period even in a third country. Of course, the cases that give us most trouble are those cases who go back to their native land. There is no question about that."

It will thus be observed that although considerable reflection was given to the provisions of 404(a) and (b), the suggestion for 404(c) was one of those last minute amendments. Finally it should be observed that administratively and judicially it has been held that the Nationality Act is prospective in operation.

Shaufus v. *Attorney General*, 45 F. Supp. 61 (D. C. Md. 1942);

In re Skoglund, 46 F. Supp. 434 (D. C. Minn. 1942).

"Were the expatriation sections retroactive, they could not interfere with or disturb the vested right of citizenship and at the same time be valid under our Constitution." *Matter of Alvarado* (Decision of Board of Immigration Appeals, File No. 56158/416, approved by the Attorney General, June 6, 1945).

Petitioner does not concede that citizens may be classified. Assuming, arguendo, that reasonable classifications may be made, it is submitted that the instant classification is unconstitutional.

(1) Native born citizens of dual nationality, and certain naturalized citizens (8 U. S. C. 805, 806) may remain abroad for fifty years, indefinitely, or from early infancy until they die. No limitation is imposed on their citizenship by mere residence abroad.

(2) Other naturalized citizens like petitioner cannot remain abroad for more than five years.

Friction may and has resulted with foreign governments in all these cases, particularly in the case of native born citizens of dual nationality. It therefore does not furnish a basis for the discrimination. *Mackenzie* v. *Hare*, 239 U. S. 299 (1915) does not sanction such a distinction. The statute involved in that case did not discriminate between native born and naturalized women—it applied to both with equal force. The discrimination based on sex upheld in *Mackenzie* v. *Hare* was merely a judicial recognition of the concept of unity between husband and wife which prevailed at the time. It is doubtful that such a distinction would be recognized today.

It is submitted that the classification created by Section 404(c) of the Nationality Act is unconstitutional and violative of the Fifth Amendment.

Point III

The Act Results in Arbitrary and Unconstitutional Expatriation

The power to naturalize is not the power to expatriate. Congress has the constitutional power to enact naturalization laws. It "is not trammeled and it may grant or withhold the privilege of naturalization upon any grounds or without any reason as it sees fit." *Terrace* v. *Thompson*, 263 U. S. 197, 220 (1923). However, Congress is restricted with reference to depriving persons of their nationality. Citizenship may not be taken away arbitrarily. *Mackenzie* v. *Hare, supra.* Moreover it is to be remembered that the very basis of expatriation is the fact that a person is permitted *voluntarily* to abandon his citizenship. *Perkins* v. *Elg*, 307 U. S. 325 (1939).

Involuntary or arbitrary loss of citizenship is not recognized under our laws or our Constitution.[6]

Under Section 404(c) of the Nationality Act, intervening war, inability to return to the United States because of shipping difficulties, because of illness acquired abroad, or because of inability to leave the foreign country (exit permission from Soviet dominated lands) and the like do not toll the five year period.

In March of 1947 a Special Committee of the National Council on Naturalization and Citizenship published a report on the "Involuntary Loss of American Citizenship." This report was prepared in collaboration with the Department of State and "the sources from which information was obtained were, primarily, American consuls in foreign countries, American social agencies . . . American business organizations having branches or affiliates in foreign coun-

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[6] *Dos Reis v. Nicolls*, 161 F. (2d) 860 (C. C. A. 1, 1947); *Schioler v. United States*, 75 F. Supp. 353 (N. D. Ill. 1948); *In re Gogal*, 75 F. Supp. 268 (W. D. Pa. 1947); *Mackenzie v. Hare, supra.*

tries, and interested individuals." A copy of this report was presented to the District Court on oral argument below. In part, this report states:

> "Difficulty in obtaining transportation because of lack of space on passenger boats was reported as the factor known to have caused loss of citizenship by consuls in South Africa, Argentina, Portugal, Sweden, Spain, and Italy. A related factor was the high cost of passage from distant points and the inability of some persons to raise the necessary funds within the two-months period before the deadline." . . . (pp. 11-12).
>
> "Delays in dealing with requests for passports and other papers by staffs of Government departments in the United States were alleged to have been responsible for the loss of citizenship in several cases." . . . (p. 14).
>
> "The agencies who reported to your Committee give vivid illustrations of further causes. Some persons did not return on time because of the seaman's strike; some could not return because in countries such as Yugoslavia, Roumania and Russia they were unable to obtain exit permits. The war brought financial stringency to others making it impossible for them to pay their own passage home or to bring their families with them. Others could not return because they could not obtain exit permits or transportation or necessary travel documents. The search for proof of naturalization took time and the preparation of necessary documents was often delayed by congestion in the offices of American government agencies.
>
> "It is clear that through the enactment of our expatriation laws a considerable number of American citizens were unduly deprived of their citizenship, contrary to their own volition, by factors beyond their own control." (p. 16).

As late as the 80th Congress, 1st Session, the Senate Subcommittee on Immigration in a report numbered 352 accompanying S. 5118, recognized that American citizens abroad were unable to return to the United States prior to October

14, 1946 by reason of factors beyond their control. The aforementioned Senate report contains a letter from the Attorney General which likewise recognized that lack of transportation and other factors prevented the return of many naturalized citizens to the United States within the time limitations of the Nationality Act of 1940. In his letter to the Committee, the Attorney General stated:

> "I do not believe that it was the purpose of Section 409 to penalize American citizens who were trying in every way possible to retain their citizenship but who were prevented from doing so by circumstances beyond their control."

The complaint herein alleges that the plaintiff was not required to return to the United States prior to October 14, 1946. The court may take judicial notice of the facts of common knowledge. *Ohio Bell Telephone Co.* v. *Commission*, 301 U. S. 292, 301 (1937). Thus the fact that War existed and that there was no shipping between the United States and Palestine during the War and for a period after the War should be noted by the court. The facts of which a court should take judicial notice need not even be averred. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 79 (1911). Therefore the fact that the plaintiff was unable to return to the United States during the War is a fact of which the court may take judicial notice.

It is therefore submitted that the instant statute is arbitrary, that it results in the involuntary loss of citizenship, and that it is violative of the Fifth Amendment. The motion to dismiss should have been denied[7] and judgment should have been entered for the petitioner.

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[7] "In a number of recent cases the Supreme Court has pointed out the inadvisability of deciding grave constitutional questions with respect to newly enacted statutes on motions to dismiss and without the benefit of a hearing of the facts of the case. See, for instance, *United States* v. *Petrillo*, 332 U. S. 1, 67 S. Ct. 1538." *Colonial Hardwood Floor Co.* v. *International Union*, 76 F. Supp. 493 (D. Md. 1948).

Conclusion

THEREFORE, it is respectfully requested that the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 284

LOUIS BERNARD LAPIDES, Petitioner

v.

TOM C. CLARK, Attorney General, and WATSON B. MILLER, Commissioner of the Immigration and Naturalization Service.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 8-12) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered May 23, 1949 (R. 13). The petition for a writ of certiorari was filed August 22, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Constitution forbids any classifications as between naturalized and native born citizens, particularly with regard to provisions for expatriation of naturalized citizens as the result of specified residence abroad subsequent to naturalization.

2. Whether Section 404 of the Nationality Act of 1940 establishes an unreasonable discrimination against naturalized citizens in subjecting them to loss of their citizenship as a consequence of their residence abroad subsequent to naturalization.

3. Whether the provisions of Section 404 have been applied arbitrarily and unreasonably against petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional provisions are relevant:

Article I, Section 8:

> The Congress shall have Power * * * To establish a uniform Rule of Naturalization * * *.

Article II, Section 1:

> No Person except a natural born Citizen * * * shall be eligible to the Office of President.[1]

Fifth Amendment:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *.

Fourteenth Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. * * *

A number of statutory provisions also require consideration. Most pertinent is Section 404 of the Nationality Act of 1940, 8 U.S.C. 804, which is directly challenged in this litigation and which provides:

> A person who has become a national by naturalization shall lose his nationality by:
>
> (a) Residing for at least two years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, if he acquires through such residence the nationality of such foreign state by operation of the law thereof; or

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[1] See also Art. I, Secs. 2 and 3, requiring that Representatives and Senators be citizens of the United States for seven and nine years, respectively.

(b) Residing continuously for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 406 hereof;

(c) Residing continuously for five years in any other foreign state, except as provided in section 406 hereof.

Numerous exceptions to Section 404 are provided in Sections 405 and 406, 8 U.S.C. 805 and 806, which are quoted at pages 3-5 of the petition. Petitioner concededly did not qualify under any of these exceptions.

Under Section 409 of the Nationality Act of 1940, the expatriation provisions of Section 404 were scheduled to become effective on October 14, 1941, one year after the date of enactment of the Act. Because of war conditions, Congress authorized postponements of the effective date on four occasions: 55 Stat. 743, 56 Stat. 779, 58 Stat. 747, 59 Stat. 544. The last of these deferments expired six years after the date of approval of the Nationality Act, and consequently naturalized citizens who failed to return to the United States before October 14, 1946, became subject to expatriation under Section 404.

STATEMENT

Petitioner was born in Austria and entered the United States in 1922. He was naturalized as a citizen on June 27, 1928. Thereafter he continued

to reside in the United States for almost six years, and in March 1934 he went to Palestine where he remained until 1947. On July 3, 1947, petitioner arrived in the United States by airplane and sought to re-enter upon presentation of his uncancelled certificate of naturalization. However, on July 8, 1947, he was excluded by a board of special inquiry of the Immigration and Naturalization Service on the ground that he had lost his American citizenship under Section 404(c) of the Nationality Act of 1940 (*supra*, p. 4) by residing in Palestine for more than five years, and subsequent to October 14, 1946, and that he was an alien not in possession of a valid immigration visa. Petitioner's appeals to the Commissioner of the Immigration and Naturalization Service and to the Board of Immigration Appeals were unsuccessful, and on August 5, 1947, the order of exclusion was affirmed by the Board of Immigration Appeals, acting for the Attorney General. (R. 1-2.)

Petitioner thereupon brought habeas corpus proceedings in the District Court for the Southern District of New York in which he challenged the legality of his detention and exclusion and contended that he was entitled to enter as a citizen of the United States. The writ of habeas corpus was dismissed and the order of dismissal was affirmed by the Court of Appeals for the Second Circuit. (R. 4, 10; *United States ex rel. Lapides* v. *Watkins*, 165 F. 2d 1017 (C.A. 2.))

Petitioner then brought this action in the District Court for the District of Columbia seeking a judgment under Section 503 of the Nationality Act, 8 U.S.C. 903, declaring that he is a citizen of the United States. In this proceeding, petitioner attacked the constitutionality of Section 404. (R. 1-5.) A motion to dismiss the complaint was granted, and the Court of Appeals for the District of Columbia Circuit, one judge dissenting, affirmed, holding that Section 404 is constitutional (R. 9). The court also adverted to the prior habeas corpus proceeding and said that petitioner could have raised the constitutional issue there. The court doubted that there was justification "for this additional and needless litigation with all its trouble, expense and delay, which the law so much abhors," but "in view of the peculiar situation" did not pass on the question whether *res judicata* applied (R. 10).

ARGUMENT

1. Petitioner's contention (Pet. 9-14) that the Constitution utterly forbids any differentiation in treatment, even one admittedly reasonable, between naturalized and native born citizens rests, we believe, upon a misconception. As originally adopted, the Constitution had very little to say about the nature and incidents of American citizenship. Its prescriptions limiting eligibility for the Presidency to "natural born" citizens and authorizing Congress to establish a uniform rule of naturalization

obviously provide no definite guidance. Even the reference to "natural born" citizens is obscure and at this late date still provokes controversy. There was no attempt even to define in the Constitution the methods of acquiring citizenship until the Fourteenth Amendment in 1868 announced for the first time that all persons born or naturalized in the United States are citizens.

Even a cursory examination of the Constitution in its original and amended form reveals many patent omissions in its formulations regarding the rights and incidents of citizenship. For example, there was no attempt to fix the nationality status of children born abroad to American citizens. The status of such persons has always been regulated by statutes which were codified in Section 1993 of the Revised Statutes and later in Section 201 *et seq.* of the Nationality Act of 1940, 8 U.S.C. 601 *et seq.* Nor is there any provision in the Constitution regarding the loss of citizenship after it had been acquired by birth or naturalization. This phase of nationality status likewise has been dealt with by statutory pronouncements, principally the Act of March 2, 1907, 34 Stat. 1228, and Section 401 *et seq.* of the Nationality Act of 1940, 8 U.S.C. 801 *et seq.*

Thus, it seems evident that the limited expressions of the Constitution were not designed to provide a comprehensive formula describing the incidents of citizenship status. Consequently those meager expressions hardly can be relied on to ex-

clude any action by Congress in the area of expatriation into which the provisions of the Constitution did not venture. In that area the authority of Congress to act emerges by necessary implication as an attribute of sovereignty. *Mackenzie* v. *Hare,* 239 U. S. 299; *Reynolds* v. *Haskins,* 8 F. 2d 473 (C.A. 10). The sweep of that power is not hindered by any specific pronouncement of the Constitution. It is subject, we believe, only to the general barriers, such as the Fifth Amendment, which may limit the exercise of Congressional authority.

We do not understand that petitioner contests the authority of Congress to define expatriation, despite the silence of the Constitution in regard to such power. Indeed, such a contention hardly could be maintained, in our opinion, in the light of the needs of national sovereignty, the consistent legislative and executive attitudes, and the doctrines enunciated by this Court. *Mackenzie* v. *Hare, supra; Perkins* v. *Elg,* 307 U. S. 325. But petitioner seizes upon several general utterances in opinions of this Court to justify his thesis that under no circumstances can Congress deal with naturalized citizens in any manner other than it deals with the native born, even if such divergent treatment is justified by a reasonable objective. We certainly do not question the general statements quoted in petitioner's brief, when read in their contexts. As a general proposition it is indisputable that a naturalized citizen stands on an equal footing with

the native born. We do not urge that there is any warrant for minimizing the full citizenship status which an alien acquires upon his naturalization. But like other groups of Americans, naturalized citizens may be required to conform with a regulation fostered by a national need and incorporated in a reasonable enactment. We submit that no determination or even observation by this Court negates such a principle. Cf. *Knauer* v. *United States,* 328 U.S. 654, 658, where the Court referred to Section 404 of the Nationality Act as creating an "exception of a limited character" to the rights and prerogatives acquired by naturalization.[2]

This concept is not inconsistent with *Osborn* v. *United States Bank,* 9 Wheat. 738, 827 (see Pet. 9). The comments of Chief Justice Marshall were entirely *dicta* and did not consider any specific question of citizenship or expatriation. Moreover, they were uttered at a time of great confusion and uncertainty as to whether an American citizen had a right to expatriate himself. See *Talbot* v. *Jansen,* 3 Dall. 133; *The Santissima Trinidad,* 7 Wheat. 283. The courts still were influenced by the common law doctrine of perpetual allegiance, which declared that no man could change the allegiance of his birth. Blackstone, *Commentaries* (Dean Gavit's Ed.) Book 1, Ch. 10, p. 156. Eventually,

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[2] Another limitation in the status of a naturalized citizen is the possibility that his naturalization may be revoked if it was fraudulently or illegally procured. *Knauer* v. *United States, supra; Klapprott* v. *United States,* 335 U.S. 601.

that uncertainty was eliminated, and the right of expatriation has been accorded positive recognition since the Act of July 27, 1868, 15 Stat. 223, later R.S. § 1999, 8 U.S.C. 800.

The executive declarations cited in petitioner's brief, pp. 11-13, favoring unlimited protection of American citizens residing abroad likewise represent a national policy which has been modified somewhat as the result of many years of experience. Later legislative and executive expressions have formulated conditions under which certain categories of American citizens who choose to live outside the United States may forfeit their claim to diplomatic protection and may abandon their American citizenship.

The implication of petitioner's argument that Section 404 represents a new departure in national policy hardly conforms with the facts. He has overlooked, for example, the many treaties concluded by the United States with foreign nations providing for loss of citizenship by an American national who reestablishes residence in his country of origin. *Perkins* v. *Elg,* 307 U.S. 325; Van Dyne, *Naturalization,* p. 335. He overlooks, also, the later executive policy, formulated prior to legislative action, which denied diplomatic protection to naturalized citizens who abandoned their domicile in the United States. See 3 Hackworth, *Digest of International Law,* 286-288. He disregards two specific enactments directed at naturalized cit-

izens who established homes in foreign countries. The first of these was Section 15 of the Act of June 29, 1906, 34 Stat. 601, later reenacted in substantially the same form as Section 338(c) of the Nationality Act of 1940, 8 U.S.C. 738(c), which directed that the naturalization of a person who established permanent residence in a foreign country within five years after his naturalization should be deemed presumptively fraudulent and subject to revocation. *Luria* v. *United States*, 231 U.S. 9, sustained the constitutionality of this enactment. The second Congressional directive was Section 2 of the Act of March 2, 1907, 34 Stat. 1228, which stipulated that

> When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen * * *.

The validity of this prescription was recognized, at least tacitly, in *United States* v. *Gay*, 264 U.S. 353.

These declarations are evidence of a generally accepted conviction that

> The tie which binds the naturalized citizen to his adopted country has always been recognized as more easily dissoluble than that which binds the native citizen of his country. [Borchard, *Diplomatic Protection of Citizens Abroad* (1915), p. 701.]

But it must not be supposed that such restrictions have been directed only against naturalized citizens. Certain categories of persons who acquired United States citizenship at birth likewise have been deemed subject to similar limitations.[3] Thus a native born American who acquired dual nationality when taken by his parents to another country during minority may lose his American citizenship unless he returns to the United States within a reasonable time, now fixed at two years, after attaining his majority. *Perkins* v. *Elg,* 307 U.S. 325; *Attorney General* v. *Ricketts,* 165 F. 2d 193 (C.A. 9); Section 401(a), Nationality Act of 1940, 8 U.S.C. 801(a). A person who acquires United States citizenship at birth abroad also may, under certain conditions, be subject to loss of that citizenship unless he establishes residence in the United States before certain designated times. Section 201 (g-i), Nationality Act of 1940, and as added by Act of July 31, 1946, 60 Stat. 721, 8 U.S.C. 601(g-i); Section 1, Act of May 24, 1934, 48 Stat. 797.[4]

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[3] At one time the Department of State took the view that native born citizens might lose their United States citizenship and the right to diplomatic protection upon establishment of permanent residence outside the United States. 2 Hyde, *International Law* (2d Rev. Ed., 1945) 1170. However, that view no longer is followed. *Id.* 1171. It should be observed that many other nations regard a citizen's residence in another country as an act of expatriation. Borchard, *Diplomatic Protection of Citizens Abroad* (1915), p. 701.

[4] It has been estimated that 85% of all expatriations involve persons who acquired United States citizenship at birth

Moreover, petitioner's denial that any distinctions are permissible in dealing with different classifications of United States citizens is refuted by several decisions of this Court. Thus, *Mackenzie* v. *Hare*, 239 U.S. 299, upheld expatriation provisions directed only against Americans of the female sex. And *Hirabayashi* v. *United States*, 320 U.S. 81, and *Korematsu* v. *United States*, 323 U.S. 214, sustained extraordinary restrictions imposed as war measures solely against American citizens of Japanese extraction.

The assumption that the Constitution forbids reasonable classifications or distinctions in the treatment of different groups of citizens thus seems unsupportable. And even the general doctrine proscribing unreasonable legislative classifications has only a limited application in this case. The Fifth Amendment contains no equal protection clause and as a consequence Congressional enactments generally are not subject to attack on the ground of unfair classification. *Detroit Bank* v. *United States*, 317 U.S. 329, 337; *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 584. For this reason most of the decisions which have condemned unequal classifications have concerned state legislation. E. g., *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Truax* v. *Raich*, 239 U.S. 33. But we do not contend that there are

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and only 15% involve naturalized citizens who lose citizenship for any cause, including residence abroad. Krichefsky, *Loss of United States Nationality*, 4 Imm. & Nat. Monthly Rev. 9 (1946).

no limits to the authority to define conduct which may cause loss of citizenship. It seems clear that arbitrary federal deprivations of a citizen's rights would be subject to attack under the Fifth Amendment as a denial of due process. *Hirabayashi* v. *United States,* 320 U.S. 81, 100.

2. A manifest attribute of the legislative process is that it frequently requires varying treatment of different groups in order to accomplish substantial public purposes. *Truax* v. *Corrigan,* 257 U.S. 312, 337. Classification is not in itself an undesirable device and only unreasonable classifications are denounced by the courts. *Takahashi* v. *Fish and Game Commission,* 334 U.S. 410; *Clarke* v. *Dekebach,* 274 U.S. 392. On many occasions this Court has upheld differentiations in treatment affecting various groups of citizens and residents, upon a showing that the classification was reasonably devised to meet a demonstrated need.[5]

We submit, contrary to petitioner's contention (Pet. 14-18), that the provisions of Section 404 of the Nationality Act are entirely fair and reasonable and are based upon solid considerations of national interest. They represent the culmination of a pol-

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[5] *Terrace* v. *Thompson,* 263 U. S. 197; *Heim* v. *McCall,* 239 U. S. 175; *Patsone* v. *Pennsylvania,* 232 U. S. 138; *Porterfield* v. *Webb,* 263 U. S. 225; *Cockrill* v. *California,* 268 U. S. 258; *Clarke* v. *Dekebach, supra; Mackenzie* v. *Hare, supra; Hirabayashi* v. *United States, supra; Korematsu* v. *United States, supra;* cf. *Takahashi* v. *Fish and Game Commission, supra; Oyama* v. *California,* 332 U. S. 633.

icy considered and developed over a period of many years.

The United States consistently has been confronted with embarrassments and difficulties provoked by certain groups of its citizens who chose to live in foreign lands. One of such groups included native born Americans who had acquired foreign nationality during their minority. See *Perkins* v. *Elg, supra.* Another such group comprised naturalized citizens who left the United States and established residence in the land of their former nationality or in other foreign lands. The national experience in dealing with these and similar situations has demonstrated an urgent need for remedial legislation.

The latter category of citizens has engendered many difficulties in the diplomatic relations of the United States with other countries. Although the vast majority of naturalized citizens have come to settle permanently and become completely assimilated in our national life, a small minority has utilized American citizenship only as a protective cloak. Some individuals have resided in the United States for the short prescribed period, acquired naturalization, and then have sought the protection of the United States in other lands. They have attempted to use American citizenship to evade obligations to which they were subject in the countries of their residence. The ties that bound these persons to the United States were tenuous.

In many instances they falsely represented that they intended to reside permanently in the United States. See Section 332(a)(18), Nationality Act of 1940, 8 U.S.C. 732(a)(18). They were merely formal citizens, whose contributions to our national life were negligible, and whose continued claim to American citizenship was a source of continued friction with other nations. 3 Moore, *International Law Digest*, 766.

The executive and legislative branches of our Government have sought for many years to cope with this problem. As we have indicated, the Department of State long ago held, even prior to the enactment of any legislation, that a citizen who established himself in a foreign country and continued to reside there without any satisfactory reason for failing to return to the United States thereby lost any right to diplomatic protection. 3 Moore, *op. cit., supra;* 3 Hackworth, *Digest of International Law*, 288. The first statute to deal with this problem was Section 15 of the Act of June 29, 1906, 34 Stat. 601, which authorized revocation of the naturalization of any person who became a permanent resident of a foreign country within five years after his naturalization. In approving that enactment in *Luria* v. *United States*, 231 U.S. 9, 23, this Court declared:

> These requirements plainly contemplated that the applicant, if admitted, should be a citizen in fact as well as name—that he should

> assume and bear the obligations and duties of that status as well as enjoy its rights and privileges. In other words, it was contemplated that his admission should be mutually beneficial to the Government and himself, the proof in respect of his established residence, moral character, and attachment to the principles of the Constitution being exacted because of what they promised for the future, rather than for what they told of the past.
>
> By the clearest implication those laws show that it was not intended that naturalization could be secured thereunder by an alien whose purpose was to escape the duties of his native allegiance without taking upon himself those of citizenship here, or by one whose purpose was to reside permanently in a foreign country and to use his naturalization as a shield against the imposition of duties there, while by his absence he was avoiding his duties here.

Within a year Congress again studied this problem and concluded that additional legislation was required. That conclusion was reflected in Section 2 of the Act of March 2, 1907, 34 Stat. 1228, quoted at p. 11, *supra*. In its report recommending this legislation the Committee on Foreign Affairs of the House of Representatives made the following comments (H. Rep. 6431, 59th Cong., 2d sess., p. 2):

> Perhaps the most important provision of the bill is desired by the State Department to guard against complications in which this country has often been involved. All desire

that the flag of this country should protect an American citizen to the fullest extent. But none of us desire that some foreigner who does not intend to cast his lot permanently with us should endeavor to avail himself of the flag as a fraudulent protection. Many foreigners come here, become naturalized, and then return to their own countries or migrate to other parts of the world, without any intention of returning to this country. They have not become citizens in good faith, but they seek to avail themselves of the protection of our citizenship in avoiding responsibility to which they may be subjected in other parts of the world.

This is not right. The citizenship of the United States should not be sought or possessed for commercial or dishonest ends. To guard against this evil this bill provides that a naturalized citizen who leaves this country and dwells elsewhere continuously for five years shall be presumed to have abandoned his citizenship. This presumption can be overcome, but such a provision as this would be a great assistance to the Department of State, would avoid possibilities of international complications, and will prevent those who are not entitled to its protection from dishonestly hiding under the American flag.

See also 3 Hackworth, *Digest of International Law*, 287.

The 1907 Act proved inadequate. In the first place, the prevailing view was that the statute did

not cause loss of citizenship but forfeited only the right to diplomatic protection.[6] Moreover, the Department of State experienced considerable difficulty in evaluating evidence as to whether persons affected by the statute had overcome the presumption it created. 3 Hackworth, *Digest of International Law*, 294 et seq. Consequently, the nationality status of such persons remained uncertain and many persisted in claiming American citizenship despite inconsistent conduct over the course of many years.

Quite understandably, therefore, serious consideration was given to this problem when the Nationality Act of 1940 was being formulated. That statute was proposed in the first instance by a committee consisting of the Secretary of State, the Attorney General, and the Secretary of Labor. *Hearings before Committee on Immigration and Naturalization on H.R. 6127, Superseded by H.R. 9980*, 76th Cong., 1st sess., p. 691 (1940). After a five-year study, the Cabinet Committee submitted a draft code to the President, who transmitted it to Congress on June 13, 1938. *Id.*, 511, 512. In their letter of transmittal, the Cabinet Committee made the following observations (*Id.*, 407, 409):

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[6] *Camardo* v. *Tillinghast*, 29 F. 2d 527 (C.A. 1); *United States* v. *Eliasen*, 11 F. 2d 785 (W.D. Wash.); *Stein* v. *Fleischmann Co.*, 237 Fed. 679 (S.D. N.Y.); 28 Op. Atty. Gen. 504. *Contra: Nurge* v. *Miller*, 286 Fed. 982 (E.D. N.Y.); *Anderson* v. *Howe*, 231 Fed. 546 (S.D. N.Y.). See also *United States* v. *Gay*, 264 U.S. 353.

The nationality problem in the United States is especially complex and difficult for several reasons. In past years large numbers of persons of foreign origin have come to the United States, have had children born to them in this country, and have subsequently returned to reside in the foreign countries from which they came, or have moved on to other foreign countries, taking their American-born children with them. In some cases the parents while in the United States obtained naturalization as citizens thereof, and in such cases children born to them in foreign countries after such naturalization have acquired citizenship of the United States at birth, under the provision of the existing law (R.S. 1993). Children born in the United States to persons of the classes mentioned acquired at birth citizenship of the United States, and in many cases they also acquired at birth the nationality of the foreign states from which their parents came, thus becoming vested with dual nationality. Dual nationality has also attached at birth to children born in certain foreign countries, having in their law of nationality the territorial rule (*jus soli*), to parents who acquired American nationality at birth or through naturalization.

* * * * *

Important reasons for terminating American nationality in cases of persons who reside in foreign countries and have to all intents and purposes abandoned the United States lie in the fact that it will prevent them from trans-

mitting American nationality to their foreign-born children having little or no connection with the United States, and embroiling this Government in controversies which they may have with the governments of the foreign countries in which they reside. The mere presumption of expatriation provided for in section 2 of the act of March 2, 1907, in cases of naturalized citizens residing for 2 years in the foreign states from which they came or 5 years in other foreign states, has proven inadequate. In general the right to protection should be coexistent with citizenship, and a law under which persons residing abroad are denied the protection of this Government, although they remain citizens of the United States and transmit citizenship to children born abroad, is deemed inconsistent and unreasonable. The admission of an alien to the privilege of American citizenship is subject to the condition that he intends to reside permanently in the United States and perform the duties of citizenship. When a naturalized citizen abandons his residence in the United States and takes up residence in the state of which he was formerly a national, definite termination of his American citizenship should follow.

The Cabinet Committee recommended enactment of provisions similar to those now found in Sections 404(a) and (b) relating to return by naturalized citizens to the country of their former allegiance. However, evidence developed in the Congressional hearings indicated the need for expansion of these

provisions to encompass residence by naturalized citizens in other foreign countries. *Id.*, 134-135, 139-141, 317. Consequently, the House Committee recommended enlargement of the proposed section to embrace what is now Section 404(c). H. Rep. 2396, 76th Cong., 3d sess., p. 84. The importance of this provision was emphasized by its sponsor in presenting it to the House. 86 Cong. Rec. 11948, 11949. After passage by the House, the bill was considered by the Senate Committee on Immigration, which reported it favorably and said of Section 404 (S. Rep. 2150, 76th Cong., 3d sess., p. 4):

> These provisions for loss of nationality by residence abroad would greatly lessen the task of the United States in protecting through the Department of State nominal citizens of this country who are abroad but whose real interests, as shown by the conditions of their foreign stay, are not in this country.

It is clear, therefore, that subsection (c) was not "one of those last minute amendments," as petitioner asserts (Pet. 17). It was the product of a long process of legislative experience and deliberation. It sought to achieve the following legitimate objectives: (a) to eliminate the uncertainties in citizenship status produced by the Act of March 2, 1907; (b) to discourage the wrongful acquisition of American citizenship by persons who do not intend to reside permanently in the United States, despite their representations in the naturalization

proceedings; (c) to prevent the retention of American citizenship by naturalized persons who utilize such citizenship only for the purpose of shielding them from obligations incident to their residence in other countries, without any reciprocal contribution on their part to the national welfare of the United States; (d) to preclude the transmission of American citizenship by such persons to their children born abroad; and (e) to avoid international embarrassments resulting from the activities of such individuals. These aims, we believe, are demonstrably sound and reasonable. Like the many other grounds for expatriation enumerated in Title IV of the Nationality Act, the proscriptions of Section 404 were aimed at conduct deemed inconsistent with fidelity to the United States.

We believe, therefore, that there is no basis for petitioner's complaint that Section 404(c) unjustly discriminates against naturalized citizens or relegates them to the status of second class citizens. That statute, as we read it in the light of its history and purpose, seeks to achieve no discrimination and no irrational impairment of citizenship status, but proclaims rather the conditions under which certain naturalized citizens may lose their citizenship by conduct that conflicts with the obligations of citizenship they have assumed. This, in our opinion, is a reasonable classification to fulfill a solid legislative purpose. And the legislation as a whole inherently furnishes convincing evidence of

the Congressional desire to deal fairly with all persons who might be affected, by specifically excluding from its ambit numerous groups who have a substantial motive for continuing to remain outside the United States, such as illness, advanced age, employment by the Government of the United States or by American business concerns, etc. Sections 405 and 406, Nationality Act of 1940, 8 U.S.C. 805 and 806.

Petitioner suggests, however, that even if there is warrant for such action by Congress in the case of persons who return to their native country, there is no evidence of a need for legislation directed against naturalized citizens who reside in countries other than those of their former nationality. This suggestion does not square with the factual situation found by Congress, which concluded that although the problem might be more acute where residence was established in the naturalized person's native country, there was adequate evidence of abuse in other cases. In any event, we believe that the evaluation of this evidence was for Congress.

It is well settled that a statute which fulfills sound legislative objectives may not be assailed because it fails to denounce other similar misconduct. Congress can legislate for one evil at a time and may decline to penalize other conduct it does not deem equally reprehensible. *United States* v. *Petrillo*, 332 U.S. 1; *Hirabayashi* v. *United States*,

320 U.S. 81, 100; *Patsone* v. *Pennsylvania,* 232 U.S. 138, 144. On the basis of evidence it deemed satisfactory, Congress restricted the requirements of Section 404 to naturalized citizens. Unquestionably it concluded that there was insufficient evidence of abuse by native born citizens. Possibly it may decide to diminish or mitigate the restrictions now found in that section. Those determinations, we submit, are confided exclusively to the discretion of Congress.

3. Petitioner's attempts to show that Section 404 has been applied unreasonably against him appear to be quite unsubstantial. In the first place, he argues that the statute arbitrarily deprived him of his citizenship without his consent (Pet. 19, 21). Concededly, Section 404, like similar provisions of the Nationality Act, is aimed only at a voluntary loss of citizenship. *Perkins* v. *Elg,* 307 U.S. 325; *Dos Reis* v. *Nicolls,* 161 F. 2d 860 (C.A. 1). But the voluntarily relinquishment which is the essence of expatriation follows from "a condition voluntarily entered into, with notice of the consequences." *Mackenzie* v. *Hare,* 239 U.S. 299, 312. Petitioner's voluntary residence in a foreign country for the prescribed period, without extenuation, subjects him to the disability prescribed by the statute.

Petitioner contends further (Pet. 21) that because of war conditions it is unfair to visit against him the consequence which flows from the appli-

cation of the conditions prescribed in Section 404. That, too, might be a significant factor in the disposition of this case if it were substantiated by any evidence of hardship. But he did not allege (see R. 1-5) that his failure to return to the United States within the required time was occasioned by transportation difficulties or any other conditions attributable to the war. He left the United States in 1934 and remained away for many years before the war. Indeed, he pleaded no excuse for his failure to return seasonably, before, during or after the war.

It should be pointed out in this connection that in the administration of this statute the Attorney General has granted wide latitude to American nationals whose return to the United States was delayed by war conditions. It is the administrative view that a naturalized citizen who attempted in good faith to return to the United States within the stipulated period but whose timely return was delayed by conditions beyond his control did not lose his American citizenship under Section 404. *In re V—*, A-6501663, BIA February 28, 1947, approved by Atty. Gen. May 14, 1947, 2 I. & N. Dec.—; *In re C—*, C-192976 (A-6576113), Comm., June 6, 1947, 2 I. & N. Dec.—; see also *Orlando* v. *Marshall,* E.D. Pa., Civ. No. 8766, decided July 14, 1949. Thus, petitioner cannot substantiate either the general asseveration that the statute has been arbitrarily applied, even in other cases, or the

specific statement on page 7 of the petition that several thousand American citizens who were stranded abroad during the war would be affected by the decision in this case.

Finally, there is no merit in petitioner's contention that Section 404(c) has been applied retrospectively against him. Petitioner resided abroad for 13 years. During that time he became subject to the presumption established by Section 2 of the Act of March 2, 1907 (*supra,* p. 11), and conceivably may have lost his citizenship under the terms of that statute. But the application of Section 404(c) in the instant case has been entirely prospective and has not taken into account any conduct prior to the enactment of the Nationality Act. Congress granted four postponements of the effective date of Section 404, six years altogether, in order to provide for persons whose return was prevented by war conditions. Section 409, Nationality Act of 1940, as amended, 8 U.S.C. 809. After the effective date of the Nationality Act as a whole, petitioner continued to reside abroad for more than the five-year period specified in Section 404(c), and such residence continued beyond the terminal date finally fixed for return to the United States. Therefore he was governed entirely by the conditions previously fixed by that section and must be deemed to have expatriated himself, even though his citizenship was acquired earlier. *Mackenzie* v. *Hare, supra; Johannessen* v. *United States,* 225 U.S. 227.

CONCLUSION

The Courts of Appeals in two circuits have ruled against this petitioner's claim to United States citizenship. There is no conflict. We believe petitioner has presented no substantial basis for questioning the decision below. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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October 1949.

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IN THE

Supreme Court of the United States

October Term, 1949

No. 284

LOUIS BERNARD LAPIDES,

Petitioner,

vs.

TOM C. CLARK, Attorney General, and WATSON B. MILLER, Commissioner of the Immigration and Naturalization Service,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF ON BEHALF OF AMERICAN JEWISH COMMITTEE AS AMICUS CURIAE

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Respondents.

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---

BRIEF ON BEHALF OF AMERICAN JEWISH COMMITTEE AS AMICUS CURIAE

Interest of the American Jewish Committee

This brief is filed, with the consent of both parties, on behalf of the American Jewish Committee, which was established in 1906 to prevent the infraction of the civil and religious rights of Jews. The American Jewish Committee has been closely concerned with questions of immigration and naturalization for the forty-three years of its existence.

It is our fundamental belief that the status of the naturalized citizen is not a matter of interest solely to him. Any act which places in jeopardy the equal status of the naturalized citizen undermines the foundation of rights guaranteed to all citizens in our democracy. The history of our nation is replete with instances which give testimony to the fact that the treatment accorded the naturalized citizen is in a large measure indicative of our democratic health.

It is our contention that Section 404 (c) of the Nationality Act of 1940 is unconstitutional, for it disturbs established rights and arbitrarily discriminates between native born and naturalized citizens in such a manner as to create for naturalized citizens a second class citizenship not wholly dissimilar to that created by Hitler's Nuremberg Laws.

Under those laws, gradations of citizens were established. Those who possessed superior racial qualities were in the privileged status of Reichsbürger, or Citizen of the Reich. Others were merely Staatsangehörigen, or mere nationals of the Reich. See Koessler, *"Subject", "Citizen", "National", and "Permanent Allegiance"*, 56 YALE L. J. 58 (1946). These laws substantially duplicated the Sixteenth century Spanish enactments instigated by the Inquisition, which made the possession of Christian blood a requirement for the status of *civis pleni juris*, or full citizenship.

In sharp contrast, ours is a nation in which traditionally all citizens have been treated equally. The naturalized citizen forms a large part of our total citizenry. Indeed, as this Court has pointed out, ours is "a country whose life blood came from an immigrant stream." We have been built by the contributions "made in peace and war by the millions of immigrants who have learned to love the country of their adoption more than the country of their birth." *Ex parte Kumezo Kawato*, 317 U. S. 69, 73.

If Congress is here permitted to discriminate against the naturalized citizen, his security will fluctuate with the political temper of majority thought. During periods of tenseness and unrest, distrust of the naturalized citizen has led to attempted abridgement of his freedom. Our experiences with two world wars has, however, demonstrated that the alarm which motivates such harsh measures as this one has been totally unwarranted.

The real threat to our democratic institutions comes not from the direction of our naturalized citizen, but rather from ill-advised discriminatory measures such as the one contested here.

Opinions Below

The majority and dissenting opinions in the Court of Appeals have not yet been reported. The majority opinion justified the discrimination against naturalized citizens in Sec. 404(c) of the Nationality Act of 1940 on the basis that national policy considerations were paramount and that it was necessary to "lessen friction with foreign governments growing out of disputes as to the nationality of our naturalized citizens * * *." The Court concluded that, since this Court has permitted a classification between native citizens because of sex, the present discriminatory classification separating native-born and naturalized citizens was not arbitrary. The dissenting judge stated that in his opinion Sec. 404(c) is unconstitutional because it embodies a discrimination against naturalized citizens and also because it arbitrarily expatriated the present petitioner.

Jurisdiction

The judgment of the Court of Appeals was entered May 23, 1949. The petition for a writ of certiorari was filed August 22, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. Whether the Constitution forbids any distinction whatsoever between naturalized and native-born citizens, with regard to a provision for the expatriation of naturalized citizens as the result of specified residence abroad subsequent to naturalization.

2. Whether Sec. 404(c) of the Nationality Act of 1940 establishes an unreasonable and arbitrary classification against naturalized citizens under the due process clause of the Fifth Amendment.

Constitutional and Statutory Provisions Involved

The following Constitutional provisions are relevant:

Article I, Section 8:

> The Congress shall have Power * * * To establish a uniform Rule of Naturalization * * *.

Article II, Section 1:

> No Person except a natural born Citizen * * * shall be eligible to the Office of President.

Fifth Amendment:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *.

Fourteenth Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. * * *

The following statutory provisions are also relevant. Section 404 of the Nationality Act of 1940, 8 U. S. C. 804, Section (c) of which is directly challenged in this litigation, provides that:

> A person who has become a national by naturalization shall lose his nationality by:
>
> (a) Residing for at least two years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, if he acquires through such residence the nationality of such foreign state by operation of the law thereof; or
>
> (b) Residing continuously for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 406 hereof;
>
> (c) Residing continuously for five years in any other foreign state, except as provided in section 406 hereof.

Exceptions to Section 404 are provided for in Sections 405 and 406, 8 U. S. C. 805 and 806, which are quoted at pages 3-5 of the petition. The petitioner concededly did not qualify under any of these exemptions.

Statement

The petitioner, who has lived in the United States for twelve years, was born in Austria. He entered the United States in 1922 and was naturalized as a citizen on June 27, 1928. The petitioner continued to reside in the United States until 1934, when he left this country for Palestine. During his absence, six years after his departure, and about twelve years after he had become a citizen of the United States, Congress enacted the Nationality Act of 1940, Sec. 404(c) of which provided that a naturalized citizen shall be deprived of his citizenship if he resides continuously for five years in any foreign state other than his country of origin.

The petitioner remained in Palestine until July, 1947. He arrived in the United States on July 3, 1947, at which time he presented his uncancelled certificate of naturalization and sought admission. But on July 8, 1947, he was excluded from this country on the ground that he had lost his American citizenship by virtue of his residence in Palestine for more than five years.

The petitioner's appeals to the Commissioner of the Immigration and Naturalization Service and to the Board of Immigration Appeals were unsuccessful; on August 5, 1947 the order of exclusion was affirmed by the Board of Immigration Appeals acting for the Attorney-General. The petitioner then brought a habeas corpus action in the District Court for the Southern District of New York in which he challenged the legality of his detention and exclusion and contended that he was entitled to enter the United States as a citizen. The writ of habeas corpus was dismissed and the order of dismissal affirmed by the Court of Appeals for the second circuit. *United States ex rel. Lapides* v. *Watkins,* 165 F. 2d 1017 (C. C. A. 2).

The petitioner then brought this action in the District Court of the District of Columbia in which he seeks

a declaratory judgment under Section 503 of the Nationality Act, 8 U. S. C. 903, that he is a citizen of the United States. The petitioner in this proceeding contends that Sec. 404(c) is unconstitutional. A motion to dismiss the complaint was granted in the District Court, and the Court of Appeals for the District of Columbia, one judge dissenting, affirmed the dismissal of the complaint.

The present petition is for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit from the Supreme Court of the United States.

SUMMARY OF ARGUMENT

The following arguments will be urged in this brief:

I. In many early as well as recent cases this Court has reaffirmed the principle that the Constitution does not provide for any distinction between native-born and naturalized citizens. A study of the historical background of the Constitution, together with an analysis of the English common law, the common law of the several states, and statements made at the time of the adoption of the Constitution buttress this accepted view.

II. Even if it were agreed *arguendo* that a classification between native-born and naturalized citizens is permitted by the Constitution, nevertheless this particular classification is an unreasonable and arbitrary one, and therefore violative of the due process clause of the Fifth Amendment. There are at least three bases on which this class legislation should be analyzed:

A. The Deprivation Involved

The deprivation of citizenship is an exceedingly severe one. This Court has revealed in recent times a growing appreciation of the significance of the right of citizenship,

and of the many crucial civil and political rights dependent upon it, and considers the loss of citizenship a harsh penalty.

B. The Showing of Need

Particularly where legislation is restrictive of fundamental civil liberties, this Court has suspended the normal presumption of constitutionality and has examined closely into the character of legislative preferences or beliefs. An affirmative showing of need for restrictive legislation has been required. Despite claims here of "urgent need", such a showing has not been made in this case. On the contrary, the history of this legislation plainly reveals that it was originally rejected by the body of law makers charged with codifying our nationality laws, because there was no need for it. The section in question was actually enacted at the last minute for the flimsiest of reasons.

C. The Requirement That the Legislation Be Narrowly Drawn to Curb the Specific Abuse

Where legislation impinging on civil rights is considered necessary, this Court has insisted that it be narrowly drawn to curb the specific evil which causes concern. Sweeping legislation which unnecessarily deprives citizens of their civil and political rights has been struck down repeatedly by this Court.

This legislation is too broadly drafted. It strips persons of their precious citizenship, whether or not they are the cause of friction, embarrassment or trouble; whether or not they are loyal to the United States, whether or not their prolonged residence abroad is voluntary, and regardless of their intent to maintain their citizenship. Residence abroad, without more, is the cause for automatic termination of citizenship. With the exception of certain nominal exemptions, individual circumstances are

not considered. Such legislative fiat is the essence of denial of due process of law.

The arbitrary character of this legislation should be contrasted with previous legislative enactments which have provided ample protection of citizenship rights while at the same time also protecting the interests of this country. The refusal, in this legislation, to consider individual cases on the basis that to do so would create administrative burdens is particularly unwarranted where the legislative history reveals that the number of citizens directly affected by this legislation is small. Even should the provisions of previous legislation not be considered practicable to deal with this problem, at the very least, proceedings for expatriation should be provided which are surrounded by constitutional securities to insure a most thorough examination into intent to expatriate oneself, and the voluntary nature of residence abroad.

Argument

I

The issue before this Court is whether it will grant certiorari in order to determine the validity of Section 404(c) of the Nationality Act of 1940, which provides that a naturalized American citizen shall be deprived of his citizenship if he resides continuously for five years in any foreign state.[1] The section does not apply to native-born American citizens, who suffer no comparable deprivation due to residence abroad, no matter how prolonged.

It is our contention that Section 404(c) of the Nationality Act of 1940 is unconstitutional since it establishes a discriminatory and arbitrary classification by which the

[1] Exemptions from Section 404(c), provided in Sections 405 and 406, 8 U. S. C. 805 and 806, are listed at pages 3-5 of the petition.

naturalized citizen is differentiated from the native-born citizen, singled out and denied his citizenship, together with its rights and privileges, if he exercises an otherwise unmolested right to reside abroad as he wishes. Such a severe deprivation resulting from an arbitrary discrimination is antipathetic to the American concept of due process of law. The heavy penalty is levied against all naturalized citizens regardless of their devotion to America and their connections here, whereas all native-born American citizens, also regardless of possible devotion to a foreign country and connections there, suffer no such penalty.

It is the purpose of this brief to discuss principally the question of the reasonableness of the classification established by Section 404(c). Since the other question presented—viz.: whether any distinction between natural-born and naturalized citizens is constitutional, appears to us to be fully discussed in the other briefs before this Court, our discussion on that point will be especially limited.

While it may be argued that the Constitution empowers Congress to "establish a uniform rule of naturalization" Article I, Section 8, Par. 4, into which may be read the implied power to stipulate acts of expatriation, it does not follow that in determining the character of citizenship rights Congress may discriminate among American citizens solely because of race, religion or—as in this case—national origin. As early as 1824, in *Osborn* v. *United States Bank,* 9 Wheat. (22 U. S.) 738, 827, Chief Justice Marshall, speaking for this Court, pointed out that the naturalized citizen "* * * becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native." And, as late as 1944, in *Baumgartner* v. *United States,* 322 U. S. 665, 673, Justice Frankfurter, quoting from *Luria* v. *United States,* 231 U. S. 9, 24, de-

clared that " 'Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects save that of eligibility to the Presidency.' " See also *United States* v. *Wong Kim Ark,* 169 U. S. 649, 702-3 and *United States* v. *Schwimmer,* 279 U. S. 644, 649.

The granting of certiorari in this case is of particular importance because this Court is now being asked by the Government to sanction a deviation from that fundamental principle, something the Court has not done before in cases involving citizenship.

In the only case in which this Court previously upheld an expatriation statute, there was permitted a distinction between citizens on the basis of sex, but not on the basis of national origin. At that time, the distinction because of sex was a realistic one founded on the then current concept of the unity of husband and wife and on the acceptance by the wife of her husband's allegiance. This Court pointed out then that "The identity of husband and wife is an ancient principle of our jurisprudence * * * It has purpose, if not necessity, in purely domestic policy; it has greater purpose and, it may be, necessity, in international policy." *Mackenzie* v. *Hare,* 239 U. S. 299, 311. Even now, statutes which discriminate against women as a class are not considered unreasonable. *Goesaert* v. *Cleary,* 335 U. S. 464. See Hover, *Citizenship of Women in the United States,* 26 Am. J. Int. Law 700 (1932) and Testimony of Emma Wold on the effect of marriage on nationality before the Committee on Immigration and Naturalization. 70th Cong., 1st Sess. (1928).

The broad question of the status of the naturalized vis-a-vis the native born citizen has been treated with extensively in an *amicus curiae* brief filed on behalf of the American Civil Liberties Union in this case in the Court of Appeals. That brief presents a historical background of the Constitutional provisions affecting the status of naturalized citizens, penetrates beyond the provisions themselves to a consideration of English common law and

the common law of the states, and considers them in light of statements contemporary with the adoption of the Constitution and with the Convention proceedings and the Constitution as a whole. The conclusion is reached that the Constitution bars any departure from the principle of equality of naturalized and native-born citizens.

II

As has been pointed out, even if it could be assumed *arguendo* that a classification between "native-born" and "naturalized" citizens were permitted, it is our conviction that the particular classification embodied in Section 404 (c) is arbitrary, unreasonable, and therefore a violation of the due process clause of the Fifth Amendment.

The Government seeks to justify the classification upon which this discrimination rests by referring to it as "entirely fair" and "reasonably devised" (Br. 14). *Detroit Bank* v. *United States,* 317 U. S. 329, 337, and *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 584, are invoked to support the proposition that Congressional enactments "generally" are not subject to attack on the ground of unfair classification.

Not that the Government does not admit (Br. 14) that there are limits to the authority to define conduct which may cause loss of citizenship, and that the arbitrary federal deprivation of a citizen's rights is subject to attack under the Fifth Amendment as a denial of due process.[2] Even the *Steward* case, usually cited to uphold a classification, reminds us that a classification is arbitrary where

[2] It is not necessary for our purpose, as the Government claims, to contend that the Fifth Amendment contains a guarantee of "equal protection of the laws." The prohibition of the Fifth Amendment against arbitrary classification on the basis of race, religion or national origin embodies the same reasoning and the same policies as does the Fourteenth Amendment. As Justice Murphy has pointed out in *Hirabayashi* v. *U. S.,* 320 U. S. 81, 112, if persons of a particular race were systematically excluded from a jury in a Federal court, a conviction obtained on that basis undoubtedly would be

it has no reasonable relation to legitimate legislative ends and is not "supported by considerations of policy and practical convenience." At 584.

This Court, which has struck down many forms of state discrimination by classification, has never exempted the Federal Government from the bar against arbitrary classifications among citizens, especially when the classifications are based on race, religion or national origin. As this Court has stated in *Hirabayashi* v. *United States*, 320 U. S. 81, 100:

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.

It is obvious that the reasonableness of legislation which enacts a classification discriminatory against one group of citizens can be determined, not by invoking a few scattered precedents, but rather by close analysis.

Three criteria usually considered when the "reasonableness" of a classification is judged are (1) the deprivation resulting from the new rule; (2) the conditions existing prior to the legislation; and (3) the possibility of achieving the same benefits at a lower price.[3] Upon analysis based on these criteria, the bankruptcy of Section 404 (c) becomes readily apparent.

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thought to violate the requirement of due process of law of the Fifth Amendment. The comparable ground commonly used in the state courts for setting aside such a conviction would be the denial of "equal protection of the laws." Compare *Glasser* v. *U. S.*, 315 U. S. 60 with *Smith* v. *Texas*, 311 U. S. 128. In invoking the numerous injunctions by this court against racial, religious or national origin discrimination, it does not seem necessary to strain the concept of due process of law, for "equal protection of the laws" on a state level is the same as due process of the law on a federal level. For a germane discussion of the "equal protection of the laws" concept in relation to due process, see the recent article by Tussman and tenBroek, *The Equal Protection of The Laws*, 37 CAL. L. REV. 341, especially at 361-5 (1949).

[3] See *The Consideration of Facts in "Due Process" Cases*, 30 COL L. REV. 360 (1930), from which these are drawn. A fourth, the effectiveness of the new rule to improve conditions, will not be discussed here since only speculation would result.

1. The Deprivation Resulting From the New Rule

There should be no question as to the importance of the rights abridged, and the extent of the deprivation involved. Citizenship has been referred to by this Court as a right "no less precious than life or liberty, indeed one which today comprehends those rights and almost all others." *Klapprott* v. *United States,* 335 U. S. 601, 616. It has, at other times, been spoken of by this Court, as "precious", *Schneiderman* v. *United States,* 320 U. S. 118, 122; "the highest hope of civilized men" *Id.,* and as "all that makes life worth living" *Ng Fung Ho* v. *White,* 259 U. S. 276, 284. It is a right from which flow other fundamental rights. Deprivation of American citizenship has been regarded by this Court as an extraordinarily severe penalty, the consequences of which are often more serious even than consequences flowing from criminal convictions. *Klapprott* v. *United States, supra.*

Even the State Department representative who pressed for passage of Section 404(c) when the Nationality Act of 1940 was in committee, admitted that the penalty was "severe". See Mr. Richard Flournoy's statement, *infra,* page 18.

2. Conditions Existing Prior to the Legislation

In the face of such a harsh penalty, we ask: What was the need? In many decisions this Court has affirmed that especial attention must be given to the basis for legislation which restricts fundamental liberties. This Court has demanded a positive showing for the need of such a measure, rather than merely the absence of a showing against it. As Mr. Justice Roberts pointed out in *Schneider* v. *State,* 308 U. S. 147, 161, speaking of the rights of freedom of speech and press, certainly no more precious than the right to citizenship itself,

> "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulations directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

And, as Justice Roberts pointed out, the "delicate and difficult task" of appraising the substantiality of reasons advanced in support of this legislation necessarily falls upon this Court.

The presumption of validity which normally attaches to legislation tends to disappear, and often is reversed, where a statute infringes basic civil liberties. Especially in due process cases is there a need for an affirmative showing that a discriminatory classification is "reasonable" in the light of conditions existing prior to the legislation, which are sought to be corrected.

a. Legislative History

In order that we may get an insight into the conditions which existed prior to the enactment of Section 404(c), let us briefly consider its history, especially since the Government in its brief in opposition to the petition for writ of certiorari seems to rest its entire case for the reasonableness of Section 404(c) on its view of that legislative history. The Government interprets the legislative record as revealing an "urgent need" for this blatant restriction on citizenship rights (Br. 15).

The Nationality Act of 1940, of which Section 404(c) is a part, amended the Citizenship Act of 1907 (34 STAT. 1228). The 1907 Act had provided, *inter alia*, that absence by a naturalized citizen for five years in a country not of his origin gave rise to a "rebuttable presumption" that the residence for that period of time was voluntary, and thus might lead to expatriation. It made similar provi-

sions for naturalized citizens who returned to their countries of origin. In actuality, reluctance to implement what was even at that time considered a harsh provision resulted in lax enforcement and lenient judicial interpretation. The presumption never became final, no matter how lengthy or for whatever cause the naturalized citizen resided abroad, and at worst, as was recommended by Attorney General Wickersham, resulted merely in a loss of diplomatic protection. There was no loss of citizenship. 28 Op. Att'y. Gen. 504. See also *United States* v. *Gay,* 264 U. S. 353; *Nurge* v. *Miller,* 286 Fed. 982; *Camardo* v. *Tillinghast,* 29 F. (2d) 527.

As this Court pointed out in the *Gay* case, at 358, the presumption was "easy to preclude and easy to overcome," and it seems to have been the attitude of the lower federal courts, following on the *Gay* decision, that the presumption in the 1907 Act was little more than a minor procedural matter, really a rule of evidence.

But after a considerable period of time the State Department expressed increasing dissatisfaction over the 1907 Act, specifically with respect to naturalized citizens who returned to countries of their origin. Naturalized citizens living in third countries provided little or no concern. Accordingly, when the Nationality Act of 1940 was projected as a comprehensive nationality law to codify all other nationality laws, serious consideration was given to the overall problem of naturalized citizens residing abroad, with particular attention paid to citizens residing in their country of former nationality.

The problem of citizens residing abroad was studied for a full five years by a Cabinet Committee of advisers which was established to prepare a draft nationality code for submission to Congress. This committee consisted of the Secretary of State, the Attorney General and the Secretary of Labor, and was composed of experts equipped with all the relevant materials and information needed. *Hearings before Committee on Immigration and Naturali-*

zation on H. R. 6127, Superseded by H. R. 9980, 76th Cong., 1st Sess., p. 691 (1940).

In its reliance upon the investigations and recommendations of this Committee, the Government in its brief refers to the "serious consideration" given to the problem of the naturalized citizen residing abroad in a country not of his origin (Br. 19). Section 404 is represented by the Government as expressing "the culmination of a policy considered and developed over a period of many years" (Br. 14-15), and also as "the product of a long process of legislative experience and deliberation" (Br. 22).

But the Government quotations and analysis of the Cabinet Committee Report give a seriously misleading impression. For the product of the five year process of deliberation by the Cabinet Committee was really a *flat rejection* of the provision which is now Section 404(c).

The Cabinet Committee did conclude that Sections 404(a) and (b), with which we are not here concerned, should be enacted, but recommended that restrictive legislation be limited solely to citizens who returned to countries of their origin, and that the 1907 Act as applied to citizens residing in third countries be unchanged. *Hearings,* at 495.

These results are not referred to or even reflected in the Government's in other respects somewhat detailed historical examination into the history of Section 404(c).

If Section 404(c), as it now stands, was rejected by the Cabinet Committee which codified the law, how then did it become a part of the present law? Congressional action was apparently stimulated by the suggestions contained in a revealing colloquy between Representative Rees and Mr. Richard Flournoy of the Department of State, during the hearings on the bill. *Hearings* at 140-141. This discussion may well represent the very apogee of legislative nonchalance in dealing with rights this Court has deemed to be "precious".

After the question of naturalized citizens residing in countries of origin had been dealt with, Mr. Rees asked Mr.

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Flournoy, "Don't you cover the question of a man who has come over here and has gone back (*sic*) to any country and remained awhile?"[4]

Mr. Flournoy. That was considered by the committee of advisers when the code was prepared, and it was thought that that might be a little severe to have expatriation resulting from residence in a third country. Since then, I may say, within the past year, one of our officials, a former consul now stationed in the State Department, sent me a memorandum saying that he thought we ought to have put into this code some provision to cover these cases.

Mr. Rees: The law is wide open now?

Mr. Flournoy: Yes.

Mr. Rees. And says that he is presumed to have lost his citizenship.

Mr. Flournoy. Yes.

Mr. Rees. In other words, you have done away with the presumption only in cases where a man goes back to his own country.

Mr. Fournoy. Under this expatriation provision, you mean?

Mr. Rees. Yes.

Mr. Flournoy. It is a serious question, and I think the committee and the subcommittee ought to consider whether it would be desirable to put in a provision to cover each person who goes to a third country. The principal cases we have, I may say, are these Zionists. They are principally Russian and German Jews who were naturalized in this country and later went to Palestine. We have other cases, but I mean there are more of that particular body than in any other category. We have other cases, for instance some German in this country who has gone

[4] One wonders whether referring to a naturalized citizen going "back" to a country from which he did not come is in the nature of a Freudian slip?

maybe to South Africa or to one place and another, and perhaps it would be desirable to have in the code a provision for termination of nationality in those cases. I think the thing is worthy of consideration. Maybe some of the representatives of the other departments here would want to express views on this.

Mr. Rees. Could there be a serious objection on your part, of your department, to a section that would provide, we will say, that the naturalized citizen, having remained away from the United States in foreign countries for a period of 5 years, would lose his citizenship, subject, however, to safeguards similar to those that are provided in the sections we have just discussed?

Mr. Flournoy: I do not think our Department would be opposed to that at all. I think rather that the Department might favor it. • • •

From this legislative discussion it would seem that to intimate, as does the Government, that Section 404(c) is the product of a "long process of legislative experience and deliberation," verges on the Pickwickian, when in truth it is seemingly the product of a memorandum from a "former consul now stationed in the State Department" and of Mr. Richard Flournoy's personal predilections. Petitioner's assertion that Section 404(c) was "one of those last minute amendments" (Pet. 17), which the Government vigorously denies (Br. 22), seems to be borne out by this record at least.

Why did the Cabinet Committee reject Section 304(c)? The answer is relevant to the quest for reasonableness. Perhaps one way of answering the question is to refer to the reasons stated by the Cabinet Committee for urging the enactment of Sections 404(a) and (b). The Committee reported that, "The number of these cases (of naturalized citizens returning to their countries of origin) is very

large, and they are a constant source of irritation." Further, the Cabinet Committee stated, "naturalized citizens who resume residence in the foreign lands from which they came are apt to renew old associations and ways of living and thinking and thus become merged in the native population, losing, to a great degree, if not completely, their American character and feeling." *Hearings*, at 495.

The Cabinet Committee pointed out that the group of citizens affected by Section 404(c) is but a small minority of all naturalized citizens residing abroad. *Hearings*, at 495. Mr. Richard Flournoy estimated that they composed but nine-tenths of the entire group. *Id.* at 141. Furthermore, as the Cabinet Committee pointed out, their identification with the native population was not as likely to occur as in the cases of naturalized citizens residing in their countries of origin. Nor was there any showing whatsoever of international friction, of embarrassments or of disloyalty on the part of naturalized citizens now covered by Section 404(c), although there was an elaborate depiction of difficulties caused by citizens returning to countries of their origin.

It would seem that for such a classification as this is to be upheld as "reasonable," there would have to be not only a showing of need on this basis, but also a clear and unequivocal showing that naturalized American citizens, by the very nature of their naturalized status, their allegiances and their loyalties, actually cause more "embarrassments and difficulties" (Br. 15) than do native-born American citizens.

But there is no reason to believe this. No showing was made—nor do we believe one can be made—to the effect that the naturalized citizen causes more friction than the native-born citizen, and thus should be discriminated against.

This point, which we believe goes to the heart of the question, is dealt with in cavalier fashion in the Govern-

ment's brief. Although two pages are devoted to an irrelevant quotation from the legislative hearings which refers to the nationality problem in general and not specifically to the problems of naturalized citizens living in countries not of their origin, only two sentences are spared for comment on this.

The Government maintains that the suggestion that there is no evidence of this kind of need for Section 404(c) "does not square with the factual situation found by Congress" and concludes, "In any event, we believe that the evaluation of this evidence was for Congress" (Br. 24). But, as has been pointed out, there is no "factual situation" and no "evidence". Furthermore, there is also no reason to assume that there is "insufficient evidence of abuse by native born citizens" (Br. 25). Nor are "those determinations • • • confided exclusively to the discretion of Congress" (Br. 25) as is contended by the Government. Such a delicate question is for this Court to decide.

The findings of the Cabinet Committee do not reflect an "urgent need" for legislation; rather, the opposite is clearly indicated. If we are to read the record correctly, there is no such showing here of need as was made, for instance, in the *Hirabayashi* case. The Government claims the *Hirabayashi* case as a support for the discriminatory classification of Section 404(c). But in that case this Court demanded an extensive showing of need for the restrictive legislation before it reluctantly allowed it to stand. And this Court in *Hirabayashi* condoned the distinction created there between American citizens only on the basis that the gravest conceivable emergency, involving the very existence of our nation in time of war and of threatened invasion, existed.

Even here, in considering the Nationality Act of 1940, a showing of need was made by the Cabinet Committee for Sections 404(a) and (b). Included in the Report of

that Committee was an extensive discussion of the problem of naturalized citizens living in countries of their origin. Cited were thirteen typical case histories of citizens who had created problems. But no such showing of need was made for Section 404(c) by the Cabinet Committee and no further showing has been attempted by the Government, either that a need exists, or that the discrimination between the naturalized and native-born citizen is justified in fact.

3. The Possibility of Achieving the Same Benefits at a Lower Price

We come then to the demand that a classification be considered unreasonable if the "benefits" it seeks may be secured at a lower price. For one citizen to lose his citizenship is a high price. But, for us, the price is higher, for it is not the price of but one citizenship. The citizenship of many thousands of naturalized citizens who have made this country their own, many of whom find themselves living abroad without intent to expatriate themselves, is at stake. Beyond those few thousands whose immediate interests are involved, and whose citizenship is imminently threatened, are the interests of over six million naturalized citizens, all of whom are jeopardized by Section 404(c) and similar class legislation.

By its very terms, Section 404(c) strips citizens of their citizenship, whether or not they cause friction, embarrassment or trouble. Naturalized citizens whose residence abroad causes no concern to our State Department are just as much deprived of their prized citizenship as are those who may be creating some international problem. Citizens whose loyalty and allegiance to the United States have never been in question are subject to a penalty which is worse than a criminal penalty equally with the citizen whose loyalty to the United States might be

shown to have changed. Citizens who have desired to return to the United States, but who have been unable to do so because of lack of shipping facilities, adequate finances or for other reasons, also have their citizenship torn from them.[5]

Termination of citizenship in Section 404(c) is automatic; it allows for no consideration of intent to retain one's citizenship. More than this, although lip-service is paid to the doctrine of *Mackenzie* v. *Hare, supra,* and *Perkins* v. *Elg,* 307 U. S. 325 that expatriation must be a "voluntary act", no investigation is provided for determining whether an act of remaining abroad continuously for five years is voluntary or involuntary.

The automatic termination of citizenship, which works such a severe hardship, is another "last-minute" legislative accident. It was recommended by the Cabinet Committee for naturalized citizens residing in countries of origin, because "* * * proceedings in the courts would be cumbersome, long-drawn out, and expensive to the government * * *" due to the large numbers in this group. *Hearings,* at 493.

Even were that reason acceptable to this Court for denying due process of law to naturalized citizens living in countries of their origin, it certainly cannot be acceptable where the number of citizens involved in Section 404(c) is small and represents no administrative burden, and where the automatic termination was originally not designed for that group.

The concept that a citizen's precious citizenship can be snatched away from him in this manner reeks of the very essence of denial of due process. Unquestionably, it facilitates administrative proceedings to lay down a fiat that if a naturalized citizen remains abroad for five

[5] That many citizens have lost their citizenship by conditions outside of their control is indicated in a Report of the Special Committee on Expatriation of the National Council on Naturalization and Citizenship, entitled *Involuntary Loss of Citizenship,* March 1947, p. 16.

years for any cause, he loses his citizenship automatically, on the assumption that his absence proves conclusively that he either intended to relinquish it, that he voluntarily relinquished it, or that he should be deprived of it, because he causes trouble, or because he is "disloyal".[6]

The due process clause of the Fifth Amendment is instinct with the concept that no such fiat is permitted unless the relationship between the act relied on (here, the act of living abroad continuously for five years) and the permissible ground allows but one conclusion. See *Heiner* v. *Donnan*, 285 U. S. 312, 324; and *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 239-240 on the invalidity of conclusive presumptions. This Court only recently struck down a statutory presumption which in effect discriminated against a citizen "because of his father's country of origin." *Oyama* v. *California*, 332 U. S. 633, 647. How much more vicious than that rebuttable presumption is this irrebuttable, conclusive presumption!

By providing for automatic termination of citizenship in the face of injunctions of reasonableness of the Fifth Amendment and in light of the requirement that expatriation be a voluntary act embodying intent to divest oneself of citizenship, Congress has plunged into the realm of unconstitutionality.

This Court has repeatedly insisted that in cases where civil liberties are involved, Congress must direct its legislation at the precise evil it seeks to curb, and not legislate in too sweeping a manner. Where it is possible to confine remedial legislation to the specific evil, it seems clear that broadly repressive legislation is both unwise and unconstitutional.

If the Government wishes to expatriate American citizens who create international friction or trouble, as is

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[6] Although the Government does not contend that a concern for "loyalty" motivated enactment of Section 404(c), see the reference in the Government brief to the effect that "the proscriptions of Section 404 were aimed at conduct deemed inconsistent with fidelity to the United States" (Br. 23).

claimed, then legislation should be designed toward that end. Such legislation would provide orderly administrative proceedings for all citizens, whether naturalized or native-born. It would then be directed at the problem, not at the class. Similarly, if the question of loyalty arose, and if it were felt that citizenship might be taken away because of disloyalty as expressed in voluntarily living abroad, then appropriate steps might be taken with respect to the individuals involved and not be directed against an arbitrarily selected group, many members of whom may be wholly innocent of disloyalty.

As this Court has said in *Schneider* v. *State*, 308 U. S. 147, 162, in striking down a statute which forbade the distribution of pamphlets, the Constitution "does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is punishment of those who actually throw papers on the streets." And, in *DeJonge* v. *Oregon*, 299 U. S. 353, 364-5, this Court stated that while "The people through their legislatures may protect themselves against • • • abuse • • • the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed." See also *Thomas* v. *Collins*, 323 U. S. 516, 532; *Cantwell* v. *Connecticut*, 310 U. S. 296, 303; *Carlson* v. *California*, 310 U. S. 106, 112; *Lovell* v. *Griffin*, 303 U. S. 444, 451.

The premise that proceedings to examine individually into the question of loyalty, of voluntariness, and of intent would be too "cumbersome, long drawn-out and expensive" was never articulated as a justification for the sweeping character of Section 404(c). Yet it seems to be an inarticulate premise in the Government's brief. There is no evidence in the record as to the validity of this proposition; there is evidence to the contrary.

There seems to be no reason, as a matter of fact, for changing the manner in which this problem was adminis-

tered in the 1907 Act. That act created a rebuttable presumption that there was a desire on the part of the citizen to voluntarily relinquish citizenship after five years unless some positive evidence to the contrary was adduced—usually to a consul in the foreign country in which the citizen was residing. The fact that the petitioner here registered for the draft, for instance, might have been considered evidence under that act of a desire to remain an American citizen and assume its responsibilities. See BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1915) 552-553.

The purpose of the 1907 Act, as administered and as interpreted by the courts, was to provide against unnecessary international entanglements without needlessly jeopardizing citizenship rights. To this end, liberal exemptions were provided for, which are lacking in Section 404 (c) although Section 404(c) does embrace other obviously discriminatory provisions exempting from the effect of the act veterans of World War I and the Spanish American War, citizens born in Puerto Rico, and others. 8 U. S. C. 805, 806.

It might readily be acknowledged that citizens living abroad do create legitimate concern, and that they may give rise to questions as to continued allegiance and be creative of international frictions. Obviously, the problem cannot be overlooked, but while it must be dealt with in a manner which is reasonably protective of this nation, at the same time it should also be protective of the priceless rights which are threatened.

In our view, the 1907 Act fulfilled this function. However, an even more thorough examination into citizenship might be desirable. We submit that no less protection should be guaranteed the naturalized citizen than is provided in the denaturalization proceeding. For Section 404(c) deals with naturalized citizens whose citizenship has been sought and won in good faith. It would be a

legislative anomaly indeed were these citizens to be afforded less protection than those who it is claimed secured citizenship by fraud and deceit.[7]

This Court has repeatedly urged the most elaborate protection for citizens in denaturalization proceedings. In *Schneiderman* v. *United States,* 320 U. S. 118, it was said of the denaturalization proceeding that "proof to bring about a loss of citizenship must be clear and unequivocal." Justice Frankfurter pointed out that the case made out by the Government in *Baumgartner* v. *United States,* 322 U. S. 665, 670 lacked "that solidity of proof which leaves no troubling doubts in deciding a question of such gravity as is implied in an attempt to reduce a person to the status of alien from that of citizen."

Finally, as Justice Rutledge declared in *Knauer* v. *United States,* 328 U. S. 654, 678, "If strings may be attached to citizenship and pulled retroactively to annul it, at the least this should be done only by those forms of proceeding most fully surrounded with the constitutional securities for trial which are among the prized incidents of citizenship."

This Court should demand no less for the citizens affected by Section 404(c) than for the citizen accused of fraud. There should be assurance of an examination on an individual, not class, basis of the elements which justify expatriation. And, as Justice Murphy has urged, where the "punishment of exile" is involved, all of "the safeguards of criminal procedure provided by the Bill of Rights" should precede the deprivation of "this most comprehensive and basic right of all." *Klapprott* v. *United States,* 335 U. S. 601, 616, 617.

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[7] If the Government does suggest that any of the naturalized citizens embraced by Section 404(c) secured their citizenship by fraud *ab initio* merely in order to have the cloak of American citizenship as a protection while living in some third country, then the denaturalization proceeding is the appropriate one. See Note, 52 YALE L. J. 1215 (1942); Black, *Disloyalty and Denaturalization,* 29 KY. L. J. 143 (1941).

Conclusion

Section 404(c) has been revealed as arbitrary and discriminatory legislation which strikes at the rights of millions of naturalized citizens. For that reason, it is respectfully requested that the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia be granted.

Respectfully submitted,

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October, 1949.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 284

LOUIS BERNARD LAPIDES,

Petitioner,

vs.

J. HOWARD McGRATH, ATTORNEY GENERAL, AND WATSON B. MILLER, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner prays, pursuant to Supreme Court Rule 33, for rehearing of the Court's order of October 24, 1949 denying certiorari herein.

Statement

Petitioner, a native of Austria, was naturalized as an American citizen in 1928. He lived in the United States for twelve years from 1922 until 1934. Because he resided in Palestine for five years subsequent to October 13, 1941, the effective date of 8 U. S. C. 804(c) [Section 404(c), Nation-

ality Act of 1940] it has been held that he was expatriated. During the greater part of this five year period, World War II interrupted transportation facilities and made return by petitioner to the United States impossible for reasons beyond his control. (Senate Report 352, 80th Congress, 1st Session).

The decision below was by a divided court. 176 F. (2d) 619. Judge Edgerton in a dissenting opinion stated that petitioner was deprived of his citizenship under a statute which was unconstitutional (1) because it unlawfully discriminated against naturalized citizens and (2) because it effected involuntary expatriation without considering the ability or inability of an individual to return to the United States. The dissent called attention to the repeated expressions of this court that "Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency". 176 F. (2d) 622 and footnote 1. The majority of the court below without reference to and in disregard of these Supreme Court expressions, held that the history of 8 U. S. C. 804 accounts for its application to naturalized citizens alone. Without distinguishing between the various subsections of 8 U. S. C. 804 the majority stated that "the statute has a purpose in the international policy of our government" and that it was needed to "lessen friction with foreign governments growing out of disputes as to the nationality of our naturalized citizens." And it necessarily concluded that the expatriation of certain classes of naturalized citizens (native born citizens, naturalized citizens who are World War I veterans, or natives of Puerto Rico and certain other naturalized citizens are exempt from 8 U. S. C. 804. See 8 U. S. C. 805, 806) had a reasonable relation to the object sought to be obtained and that the classification made by the statute was therefore constitutional. 176 F. (2d) 620.

Basis for Rehearing

1. The respondent urged, and the court below predicated its opinion (176 F. (2d) 619) that the statute herein [8 U. S. C. 804(c)] was constitutional upon the proposition that the statute had a reasonable relation to the international policy of our Government. On October 28, 1949 counsel discovered an official statement of the State Department, annexed as Appendix herein, which conclusively establishes that 8 U. S. C. 804(c) has not and never had, a reasonable relationship to our foreign policy. This statement was made in support of the State Department's continuing efforts to have 8 U. S. C. 804(c) repealed. The Department of Justice has consistently opposed such repeal.

This State Department declaration was available to the government but was not disclosed to this court or to the court below. In fact, respondent deliberately asserted a contrary position. This statement has never been made public and was not available to petitioner until October 28, 1949. It reveals that the State Department charged with our foreign policy considers that 8 U.S.C. 804(c) "does not serve the interests of the United States" and is "disadvantageous to the United States" (Appendix pp. 7, 9). In addition the Department of Justice itself acknowledges the involuntary aspects of expatriation under this statute by conceding that there are "a number of naturalized citizens of the United States residing in foreign countries who, *for reasons beyond their control,* have lost their citizenship because of their failure to return to the United States by October 14, 1946" (See Appendix p. 10. Letter from the Assistant Attorney General to Senator Wiley). Compare these expressions with the assertion of the Government in its brief that the provisions of 404 of the Nationality Act (8 U.S.C. 804) "are entirely fair and

reasonable and are based upon solid considerations of national interest." (Brief in opposition p. 14.)

Indeed, the failure of the Government to differentiate between the several subsections of Section 404 (8 U.S.C. 804) when it speaks of policy considerations in the statute's legislative history is misleading and deals in half-truths. The legislative history shows policy considerations relating to national interest only in support of subsections (a) and (b) of Section 404 (8 U.S.C. 804). There are no such considerations to support enactment of Section 404(c) (8 U.S.C. 804(c)). Subsections (a) and (b) of the statute relate to naturalized citizens who return to their countries of origin or to countries of which they were formerly nationals. These naturalized citizens, and only these, presented problems of national interest. Subsection (c) refers to naturalized citizens who go to third countries, with which they have no former ties. They present no problems in such countries different from problems posed by native-born American citizens who reside in the same foreign countries. Thus, the legislative history does not support any basis for classification or discrimination under 404(c) (8 U.S.C. 804(c)). There are stated bases for such classification in the legislative history of Section 404(a) and (b) (8 U.S.C. 804(a), (b)). The Government erroneously extends these latter considerations to Section 404(c) (8 U.S.C. 804(c)).

The Department of Justice in the instant case did not fully and fairly inform the court of all the facts relative to the policy of the Government and the history of 8 U.S.C. 804(c). Its failures in this regard are noted above and in the brief filed by the Amicus Curiae herein. The expressions of the State Department are at such great variance with the views taken by respondents and have such a material bearing on the constitutionality of the

statute herein that petitioner believes that rehearing is appropriate.

2. The Department of Justice has acknowledged that "a number" of naturalized citizens were involuntarily expatriated by residence abroad under 8 U.S.C. 804(c). (Appendix p. 10). That there were many such cases has been reported to the Department of State. [See Involuntary Loss of American Citizenship p. 16, Report of Special Committee on Expatriation, National Council on Naturalization and Citizenship (March 1947).] The State Department refers to specific groups of such persons (Appendix p. 8).

In at least two such cases, litigation has been instituted in the District Court for the District of Columbia challenging the constitutionality of the statute herein. (Nos. 2329/1949; 2390/1949). It is therefore apparent that the issues involved here should be resolved by the Supreme Court to avoid repetitive litigation over this important problem of citizenship.

Certification Pursuant to Rule 33

Pursuant to Rule 33 as amended counsel certifies that this petition is presented in good faith and not for delay and that it is restricted to the substantial grounds noted above which were available to petitioner but not previously presented. That as noted above the documents upon which this petition is based were not open to the public and did not come to counsel's attention until October 28, 1949.

Conclusion

Petitioner has been deprived of the precious right of American citizenship under a statute which a divided court below believed constitutional. This case is the first

one to challenge the constitutionality of this statute. In view of the conflict in the court below on this important issue of citizenship, the declaration of the State Department that the statute is detrimental to the interests of the United States—a declaration which was not heretofore considered, in view of lack of support in the legislative history of 8 U.S.C. 804(c) for the majority opinion below and in view of the repeated expressions of this court in conflict with the opinion below, petitioner respectfully requests rehearing and that certiorari be granted.

Respectfully submitted,

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APPENDIX

LETTER OF JULY 15, 1947 FROM ASSISTANT SECRETARY OF STATE TO SENATOR FRANCIS J. MYERS

"Dear Senator Myers:

The Department has received your letter of June 13, 1947 requesting its views on the amendment which you intend to propose to S. 518, a bill "To amend the Nationality Act of 1940 to preserve the nationality of citizens who were unable to return to the United States prior to October 14, 1946." Your proposed amendment has as its principal purpose the repeal of subsection (c) of Section 404 of the Nationality Act of 1940, as amended. It also provides that no person shall be deemed to have lost his nationality because of the application of the provisions of the subsection just mentioned.

The Committee appointed by Executive order of November 25, 1933 consisting of the Secretary of State, the Attorney General and the Secretary of Labor to revise the nationality laws of the United States, to recommend revision and to codify the nationality laws of the United States into one nationality law for submission to the Congress did not recommend the enactment of the provision of law now embodied in subsection (c) of Section 404. The considerations which would seem to justify the expatriation of a naturalized American citizen who resides for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, as now provided in subsection (b) of Section 404 of the Nationality Act, do not have the same force with respect to a naturalized American citizen who does not reside in such a country. The latter would be less apt to resume his former ties and affiliations and to give allegiance to the country of residence rather than to the United States. The experience of the Department has strongly inclined it to the opinion that subsection (c) of Section 404 of the Nationality Act does not serve the interests of the United States. It would seem, particularly at this time, that the interests of the United States would best be served by permitting American citi-

zens to reside in various parts of the world, except in the cases of naturalized American citizens who reside in the countries of which they were formerly nationals or in which the places of their birth are situated, without the possible penalty of loss of citizenship by the mere fact of residence. Many persons who were naturalized as American citizens, some of whom are now considered to have lost their citizenship under subsection (c) of Section 404 of the Nationality Act have promoted in a substantial manner the interests of this country. Some have resided abroad solely or principally for the purpose of promoting American trade and commerce although, not being direct representatives of American business organizations having their principal offices or places of business in the United States from which they receive substantial compensation, they do not come within the exceptions provided in subsection (b) of Section 406 of the Nationality Act. Others who have been considered to have lost citizenship under subsection (c) of Section 404 of the Nationality Act are physicians, dentists, engineers or persons who pursue other professional or scientific occupations, almost all of whom resided in the United States for many years, were educated or trained in this country and have followed their professional and scientific occupations in foreign countries. Experience has indicated that it is likely that naturalized citizens who are educated or trained in the United States for professional and scientific pursuits have in general a good American background and that their presence abroad promotes American interests and prestige. Some American organizations carry on their foreign business through foreign corporations but obtain for such foreign corporations personnel trained in the United States by the American organizations. While such personnel cannot be considered as representatives of American organizations within the meaning of subsection (b) of Section 406 of the Nationality Act they nevertheless serve the interests of American organizations by their technical knowledge of American procedures and operations and hence in a substantial way serve the interests of the United States. In the past because of adverse economic conditions in

Puerto Rico and the Virgin Islands thousands of the natives have gone to various parts of the Western Hemisphere under foreign sovereignty to obtain employment. Those who were born before the United States became sovereign in Puerto Rico and the Virgin Islands and have remained in any one foreign country in the Western Hemisphere for a period of five years are considered to have lost citizenship in the United States under subsection (c) of Section 404 of the Nationality Act since they are considered naturalized American citizens within the meaning of the term "naturalization" as defined in Section 101(c) of the Nationality Act. The section of law under discussion is considered by the persons concerned as unjust in its application to them since they were born and resided most of their lives in territory which for many years has been under American jurisdiction. Only a few categories of cases have been discussed; there are, however, many other categories of cases equally meritorious which have not been discussed.

It is the considered opinion of the Department that subsection (c) of Section 404 of the Nationality Act should be repealed, since it is believed in general to be disadvantageous to the United States, requiring it to withdraw citizenship from many persons who were naturalized in good faith in the United States and who while abroad have actively and substantially promoted the interests and prestige of the United States and leaving such persons in the situation of being stateless. If some objection might be made on the ground that some naturalized American citizens who in no sense promote the interests or prestige of the United States would by the repeal of the subsection under discussion be able to retain their American citizenship while continuing to reside abroad, it should not be overlooked that in unmeritorious cases the Department could in the exercise of its discretion decline to accord documentation as American citizens to the persons concerned or to protect them should they be involved in incidents resulting in their request for diplomatic protection on the part of the United States.

Because of the urgency of the matter this letter has not been cleared with the Bureau of the Budget, to which a copy is being sent.

A copy of this letter is being sent to the Chairman of the Senate Committee on the Judiciary.

Sincerely yours,

FOR THE SECRETARY OF STATE:
—— ——, *Assistant Secretary*"

EXCERPT FROM LETTER OF JANUARY 29, 1948 FROM PEYTON FORD, THE ASSISTANT TO THE ATTORNEY GENERAL, TO SENATOR ALEXANDER WILEY.

"It is understood that there are a number of naturalized citizens of the United States residing in foreign countries who, for reasons beyond their control, have lost their citizenship because of their failure to return to the United States by October 14, 1946. If the bill under consideration is intended to provide relief in such cases it is believed that such purpose could better be accomplished by amending Section 409 so that a person who had failed to return to this country by October 14, 1946, could retain his nationality if he returned by October 14, 1948. If it should be found later that world conditions are such that by that date there are still deserving cases who have been unable to return here, consideration may be given to a further extension of time."